

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/STOP PRESS: THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

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STOP PRESS:

The Third Parties (Rights against Insurers) Act 2010 makes provision about the rights of third parties against insurers of liabilities to third parties in the case where the insured is insolvent. The Act received the royal assent on 25 March 2010 and comes into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet.

Section 1 sets out when a statutory transfer of rights occurs and specifies when the third party may enforce those rights. A new mechanism is introduced by s 2 to enable a third party to bring proceedings against an insurer without first establishing the fact and amount of the insured's liability. Section 3 deals with Scotland. Section 4 lists the circumstances in which an individual is a 'relevant person' for the purposes of the 2010 Act. By virtue of s 5, a statutory transfer from a deceased insured takes place only where the debtor dies insolvent subject to a liability against which he is insured. Section 6 lists the circumstances in which a body corporate or an unincorporated body is a 'relevant person' for the purposes of the 2010 Act. Section 7 deals with Scotland. Under s 8, a third party does not receive a right to recover from the insurer any amounts in excess of the insured's liability. By virtue of s 9, the rights transferred to the third party are subject to all of the defences which the insurer could use against the insured, but for three specified exceptions, which prevent an insurer from defeating a third party's claim by relying on certain technical defences, based on conditions in the insurance contract. The insurer's rights to deduct money owed to it by the insured from the monies payable to the third party is preserved by s 10. Section 11 introduces Sch 1, which confers on the third party rights to obtain information about the insurance policy. Section 12 sets out rules governing when an action to enforce rights transferred by the 2010 Act will be time-barred. Section 13 sets out what is to happen in cases in which the third party is domiciled in one part of the United Kingdom and the insurer is domiciled in another. Section 14 sets out the effect of the statutory transfer on the third party's rights against the insured. By virtue of s 15, the 2010 Act does not apply where the liability incurred referred to in s 1(1) is itself a liability incurred by the insurer under a contract of insurance. By virtue of s 16, a third party will be able to make a direct claim against an insurer even if the insurance covered liabilities voluntarily-incurred by the insured. An insurance contract is prevented by s 17 from being drafted so as to nullify the effect of the 2010 Act. By virtue of s 18, the 2010 Act will apply irrespective of whether the case has any foreign elements. Section 19 gives the Secretary of State a power by order to amend ss 4, 5 or 6 to take account of Northern Ireland legislation. Section 20 gives effect to Sch 2, which replaces references to the Third Parties (Rights against Insurers) Act 1930 in other legislation with references to the 2010 Act, Sch 3, which sets out transitional provisions, and Sch 4, which makes various repeals and revocations. Section 21 deals with the short title, commencement and extent.

Amendments, repeals and revocations

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of

the in-force dates of the provisions of the Act. This information may also be found in the COMMENCEMENT OF STATUTES table in the Current Service Noter up booklet. Please also note that these lists are not exhaustive.

Specific provisions of a number of Acts are amended or repealed. These include: Third Parties (Rights Against Insurers) Act 1930; Insolvency Act 1985 Sch 8 para 7; Insolvency Act 1986 Sch 14; Road Traffic Act 1988 s 153.

Notes on the Finance Acts 2003-2009 have been contributed by David R Harris, LLM, of Lincoln's Inn, Barrister.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(1) ORIGIN AND COMMON PRINCIPLES/1. Development and sources of insurance law.

1. INTRODUCTION

(1) ORIGIN AND COMMON PRINCIPLES

1. Development and sources of insurance law.

The concept of insurance, in England as elsewhere, arose out of the mercantile adventure of transporting goods across the sea, the adventure consisting in early times of the enormous fortune to be made if the project turned out to be successful, as contrasted with the disastrous loss, even ruin, which resulted if the project foundered amid the perils of the seas¹. It is not surprising, therefore, that the common law of insurance developed in the first instance through decisions on marine insurance. Non-marine insurance first made its appearance in the form of life and fire insurance, but until the middle of the nineteenth century these three types of insurance comprised, in practice, substantially the whole range of insurance².

In life and fire policies it soon became the practice to stipulate for arbitration to decide disputes, and this was later followed in most standard forms of non-marine insurance³. A more recent development has been the creation of Ombudsman schemes⁴. Therefore, there are historically fewer court decisions bearing directly on non-marine questions than there are relating to marine insurance, and recourse must frequently be made to the basic principles as formulated in marine cases and codified in the Marine Insurance Act 1906⁵.

1 For the early history of insurance law see 8 Holdsworth's History of English Law (2nd Edn) 273 et seq.

2 See 8 Holdsworth's History of English Law (2nd Edn) at 294 et seq.

3 Arbitration clauses have been criticised on the grounds that legal aid is not available in an arbitration, and that an insurer who proposes to rely on a technically valid but unmeritorious defence may, by insisting on arbitration, avoid damaging publicity which might result from proceedings in court: see the Fifth Report of the Law Reform Committee 1957 (Cmnd 62) PARA 11. The Association of British Insurers and Lloyd's announced an agreement by which their members generally refrain from insisting on the enforcement of an arbitration clause if the insured seeks to have a question of liability, as distinct from the amount of a claim, determined by a court in the United Kingdom; the agreement does not apply to a contract of reinsurance, a contract of marine insurance, a contract of insurance against certain aviation risks, a contract of credit insurance or where the terms of the insurance are set out in a contract or policy which is specially negotiated and in which an arbitration clause has been specifically agreed: see 107 L Jo 61; Fifth Report of the Law Reform Committee 1957 (Cmnd 62) PARA 13. As to arbitration clauses see further PARA 185 et seq post.

4 As to the Financial Ombudsman Service see PARAS 826-830 post.

5 Except as provided in the Marine Insurance Act 1906 s 2 as to mixed land and sea risks (see PARA 218 post), nothing in the Act is to alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as defined by that Act (see PARA 216 post): s 2(2).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(1) ORIGIN AND COMMON PRINCIPLES/2. Principles common to all insurances.

2. Principles common to all insurances.

There is no general statutory definition of a contract of insurance. However, the business of effecting and carrying out contracts of insurance is regulated by statute, and for this purpose 'contract of insurance' has a statutory definition¹. Insurance contracts are governed by the general law of contract² subject to some additional special principles such as the duty of good faith³.

The basic principles applicable to matters of insurance flow from the nature of an insurance contract as conceived by the law merchant⁴ and taken over by the common law. They are, therefore, common to both marine and non-marine contracts⁵. The essential features of an insurance contract are: that a sum of money will be paid by the insurers on the happening of a specified event; there must be uncertainty as to the happening of the event, either as to whether it will happen or not, or, if it is bound to happen, like the death of a human being, as to the time at which it will happen⁶. There must also be an insurable interest in the insured, which is normally that the event is one which is prima facie adverse to his interest⁷. To constitute an insurable interest the same general conditions must be fulfilled in all classes of insurance⁸, although there are distinctions in the way in which the topic is approached. In life insurance the insured must have an insurable interest at the commencement of the risk, but he need not retain it until the end of the life insured⁹. In fire insurance, and in marine insurance where there is no 'lost or not lost' clause¹⁰, the insured cannot recover unless he has an insurable interest at the time of the loss¹¹, but it is immaterial that he had no interest at the commencement of the insurance provided he has acquired it before the loss¹².

1 See the Financial Services and Markets Act 2000; and PARA 31 et seq post. For the meaning of 'contract of insurance' in that context see PARA 21 post. At the date at which this volume states the law, for the purposes of its regulatory functions, the Financial Services Authority is preparing guidance on the identification of contracts of insurance: see FSA Consultation Paper No 150 August 2002.

2 *Cehave NV v Bremen Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 71, [1975] 3 All ER 739 at 756, CA, per Roskill LJ: 'It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law.'

3 As to the duty of good faith see PARA 5 post.

4 The law merchant has been defined as follows: 'it is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of the Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the Common Law, and may thus be said to form part of it': *Goodwin v Robarts* (1875) LR 10 Exch 337 at 346, 44 LJEx 157; affd (1876) 1 App Cas 476, [1874-80] All ER 628, HL.

5 *Castellain v Preston* (1883) 11 QBD 380 at 386, CA, per Brett LJ.

6 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J; *Department of Trade and Industry v St Christopher Motorists Association Ltd* [1974] 1 All ER 395 at 400, [1974] 1 WLR 99 at 105 per Templeman J. The right to have a claim considered by a union that conducted legal proceedings on behalf of its members, indemnified members against claims for damages and costs and gave advice on various matters, did not amount to a contract of insurance, for it was a right to a benefit other than money or money's worth: *Medical Defence Union Ltd v Department of Trade* [1980] Ch 82, [1979] 2 All ER 421 per Megarry V-C.

7 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J, as explained in *Gould v Curtis* [1913] 3 KB 84, CA.

8 *Castellain v Preston* (1883) 11 QBD 380 at 397, CA, per Bowen LJ. See further PARAS 366-387, 535-544, 606-625, 782 post.

9 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch.

10 As to a 'lost or not lost' clause see PARA 372 post.

11 *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, HL; *Sadlers' Co v Badcock* (1743) 2 Atk 554.

12 *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282, applying *Rhind v Wilkinson* (1810) 2 Taunt 237.

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3. The principle of indemnity.

Most contracts of insurance¹ belong to the general category of contracts of indemnity² in the sense that the insurer's liability is limited to the actual loss which is, in fact, proved³. The happening of the event does not of itself entitle the insured to payment of the sum stipulated in the policy⁴; the event must, in fact, result in a pecuniary loss to the insured⁵, who then becomes entitled to be indemnified subject to the limitations of his contract⁶. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers⁷. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss⁸. The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more⁹, whatever may have been his estimate of what his loss would be likely to be, and whatever the premiums he may have paid, calculated on the basis of that estimate. However, if he wants to guard against unpredictable fluctuations in values, particularly of goods for which there may be a very variable market, and the consequent danger of paying far too much in premiums for what the goods turn out to be worth at the date of loss, he may persuade his insurers to enter into an agreement at the time of making the insurance, and from time to time afterwards, fixing the value. If recorded in or annexed to the policy, such an agreement makes it a valued or agreed value policy, and, in the absence of fraud or circumstances invalidating the agreement, the insurers will be precluded from challenging the agreed value if and when a loss occurs¹⁰. In all contracts of insurance, whether marine or non-marine, which are contracts of indemnity, the insurer is entitled to be subrogated¹¹ to the rights of the insured, and to a contribution¹² from other insurers where he has paid the whole of the loss or more than his proportionate share of it.

1 Exceptions to this principle are life insurance, personal accident and sickness insurance and some forms of contingency insurance; see PARAS 4, 780-782 post.

2 As to contracts of indemnity see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255 et seq. For distinctions between insurances and guarantees see PARAS 798-799 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1022.

3 See eg *Darrell v Tibbitts* (1880) 5 QBD 560, CA; *Castellain v Preston* (1883) 11 QBD 380, CA; *Meacock v Bryant & Co* [1942] 2 All ER 661; *Haghiran v Allied Dunbar Insurance* [2001] 1 All ER (Comm) 97, CA.

4 *Dane v Mortgage Insurance Corp Ltd* [1894] 1 QB 54 at 61, CA, per Lord Esher MR; *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825, [1957] 1 WLR 45 at 49 per Devlin J.

5 *Garden v Ingram* (1852) 23 LJCh 478 at 479 per Lord St Leonards.

6 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch.

7 *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 711, HL, per Lord Selborne LC; cf *Curtis & Sons v Mathews* (1918) as reported in 35 TLR 189, CA.

8 *Chapman v Pole* (1870) 22 LT 306 at 307 per Cockburn CJ; *Richard Aubrey Film Productions Ltd v Graham* [1960] 2 Lloyd's Rep 101.

9 *Castellain v Preston* (1883) 11 QBD 380 at 386, CA, per Brett LJ.

10 See the Marine Insurance Act 1906 s 27; and PARAS 222-223 post. For instances of valued policies relating to insurance other than marine insurance see *City Tailors Ltd v Evans* (1921) 38 TLR 230, CA; *Elcock v Thomson* [1949] 2 KB 755, [1949] 2 All ER 381.

- 11 As to the principle of subrogation see PARAS 195 et seq, 490 et seq post.
- 12 As to the right to a contribution see PARAS 210-211 post.

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4. Exceptions to the principle of indemnity.

Contracts of life insurance, personal accident and sickness insurance and some forms of contingency insurance are not strictly contracts of indemnity¹. In contracts of this class there is normally no necessity to prove a pecuniary loss². If the insured chooses, for example, to value a leg or an eye at £50,000 or £500,000, and to pay premiums accordingly, he is entitled to recover the stipulated sum in the event of his losing the member in question. His estimate of his possible loss is, in effect, regarded as genuine and acceptable, even if not agreed, because no one is likely deliberately to inflict such damage on himself, and no one can, in fact, foresee, even at the date of loss of the member, what the full pecuniary loss is likely to be. Similarly, a proposer can value his life at any figure that he can afford, particularly as he is unlikely to be able to foresee, at the date when he takes out the policy, what at the date of his death his financial obligations to his dependants may be. Indeed, it has been said that such an insurance is really a form of investment³. The same principle is equally applicable whether the life insured is that of the insured himself, or of some other person in whose life he has an insurable interest⁴; the sum insured becomes payable in all cases merely by reason of the happening of the event. Similarly, in some forms of contingency insurance the contract is merely to pay a fixed sum or a sum arrived at by a stipulated calculation if the contingency matures⁵.

1 See *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch (life assurance); *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45 at 53 per Alderson B (personal accident and sickness insurance). A policy insuring a third person against personal accident is, however, a contract of indemnity: *Blascheck v Bussell* (1916) 33 TLR 51 (affd 33 TLR 74, CA); *Hebdon v West* (1863) 3 B & S 579. As to contracts of indemnity see PARAS 2-3 ante. As to contingency insurance see PARA 780 et seq post.

2 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch; *Law v London Indisputable Life Policy Co* (1855) 1 K & J 223; *Gould v Curtis* [1913] 3 KB 84 at 95, CA, per Buckley LJ.

3 *Gould v Curtis* [1912] 1 KB 635 at 640 per Hamilton J; affd [1913] 3 KB 84, CA.

4 See PARAS 535-544 post.

5 See PARA 781 post.

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5. The principle of good faith.

The duty of good faith is of universal application to all classes of insurance¹, although there are various differences in detail affecting the way in which the duty is applied. In marine insurance² and in commercial insurance placed at Lloyd's³ it is not the insurers' practice to ask the insured to complete a proposal form; they rely for their protection on the common law duty of disclosure⁴ in the course of the presentation of the risk by the broker⁵. In other cases, however, there is usually a written proposal containing specific questions, indicating that information in relation to the circumstances covered by the questions is regarded by the insurers as material⁶.

Hence, a fact such as a previous refusal of insurance, which is not regarded as material in marine insurance⁷, is normally regarded as material in fire and burglary insurance⁸. In marine insurance every material representation made during the negotiations, even if only made as a matter of belief, must be true⁹, but in life insurance it is often sufficient that a representation given on the basis of knowledge or belief is honestly made¹⁰. If a statement which cannot be based on the proposer's own knowledge is required to be true, an express warranty is necessary¹¹.

1 *Lindenau v Desborough* (1828) 8 B & C 586 at 591 per Bayley J; *London Assurance v Mansel* (1879) 11 ChD 363 at 367 per Jessel MR. As to the duty of good faith generally see PARA 36 et seq post.

2 As to marine insurance see PARA 215 et seq post.

3 As to Lloyd's see PARA 24 post.

4 As to the principle of disclosure see PARA 36 et seq post.

5 As to brokers in marine insurance see PARAS 268-271 post.

6 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at 362, CA, per Scrutton LJ. See generally para 56 et seq post.

7 *Lebon & Co v Straits Insurance Co* (1894) 10 TLR 517, CA. See also PARA 404 text and note 1 post.

8 *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593 at 611, CA, per Sargant J; affd [1927] AC 139, HL. As to what is included in 'burglary insurance' see PARAS 644-645 post.

9 As to representations see PARA 408 post.

10 *Wheelton v Hardisty* (1858) 8 E & B 232 at 297, Ex Ch, per Willes J; *Thomson v Weems* (1884) 9 App Cas 671 at 684, HL, per Lord Blackburn.

11 *Anderson v Fitzgerald* (1853) 4 HL Cas 484; see further PARAS 51-52, 62 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(1) ORIGIN AND COMMON PRINCIPLES/6. Rights of third parties.

6. Rights of third parties.

The common law doctrine of privity of contract¹ applies to contracts of insurance as to other contracts. The common law is, however, modified by the Contracts (Rights of Third Parties) Act 1999². Further, there are a number of statutory exceptions to the doctrine specifically in respect of insurance. These are in the Fires Prevention (Metropolis) Act 1774³; the Married Women's Property Act 1882⁴; the Third Parties (Rights against Insurers) Act 1930⁵ and the Road Traffic Act 1988⁶. Rights under an employer's liability insurance may transfer where there is a transfer of an undertaking⁷. Additionally, in relation to motor vehicle insurance, the creation of the Motor Insurers' Bureau⁸ gives rights of claim to third parties who are victims of either uninsured or untraced drivers. Third parties may also gain rights where the courts hold that a trust exists in their favour⁹.

1 As to privity of contract see CONTRACT vol 9(1) (Reissue) PARA 748 et seq. By the doctrine a person may not enforce all or part of a contract to which he is not a party.

2 As to the Contracts (Rights of Third Parties) Act 1999 see CONTRACT. The Act gives a person who is not a party to a contract the right to enforce a term in the contract in certain circumstances as set out in the Act, eg if the contract expressly provides that he may do so.

3 Fires Prevention (Metropolis) Act 1774 s 83; see PARAS 637-639 post.

4 Married Women's Property Act 1882 s 11 (as amended); see PARA 558 post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 274, 276.

5 See PARAS 677-684 post.

6 Road Traffic Act 1988 s 151 (as amended); see PARAS 746-749 post.

7 *Bernadone v Pall Mall Services Group* [2000] 3 All ER 544, [2000] Lloyd's Rep IR 665, CA. As to transfers of undertakings generally see EMPLOYMENT vol 39 (2009) PARAS 111-116.

8 As to the Motor Insurers' Bureau see PARAS 757-765 post.

9 See *Bowskill v Dawson* [1955] 1 QB 13, [1954] 2 All ER 649, CA (express trust); *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418 HL (bailee); and PARA 699 text and note 6 post. As to trusts generally see TRUSTS.

UPDATE

6 Rights of third parties

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(1) ORIGIN AND COMMON PRINCIPLES/7. Principles peculiar to marine insurance.

7. Principles peculiar to marine insurance.

The following distinctions exist between marine insurance and non-marine insurance:

- 1 (1) a contract of marine insurance is inadmissible in evidence unless it is embodied in a policy¹, but contracts of non-marine insurance can be made orally and are enforceable, even though no policy has been issued²;
- 2 (2) a contract of marine insurance made by an agent may be ratified after loss³, but a contract of fire insurance is incapable of ratification after loss⁴;
- 3 (3) the amount recoverable under a contract of marine insurance is measured by the value at the commencement of the risk, and not by the value at the time of the loss⁵, whereas in non-marine insurance the basis of calculation is the value at the time of the loss⁶;
- 4 (4) a policy of marine insurance is 'subject to average' as a matter of course⁷, but non-marine policies are not subject to average in the absence of an express average clause⁸;
- 5 (5) a voyage policy of marine insurance is liable to be avoided by a deviation from the voyage insured⁹; in non-marine insurance the effect of an alteration of the risk depends on the nature of the alteration and the terms of the contract¹⁰;
- 6 (6) the extended right of disclosure known as 'disclosure of ships' papers' is confined to marine insurance; in the case of non-marine insurance the insurers are entitled to ordinary disclosure only¹¹;
- 7 (7) it is only in marine insurance that there can be a constructive total loss¹².

1 It is a marine policy in accordance with the Marine Insurance Act 1906, which may be executed and issued either at the time when the contract is concluded or afterwards: Marine Insurance Act 1906 s 22; see PARA 220 post. Apparently at common law a contract of marine insurance could be made by parol: *Davies v National Fire and Marine Insurance Co of New Zealand* [1891] AC 485 at 496, PC.

2 *Murfit v Royal Insurance Co Ltd* (1922) 38 TLR 334; *Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd* [2003] EWCA Civ 283, [2003] All ER (D) 79 (Mar).

3 Marine Insurance Act 1906 s 86; see PARA 388 post.

4 *Grover and Grover Ltd v Mathews* (1910) 15 Com Cas 249; but see *Waters and Steel v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870, where the marine rule was apparently applied.

5 As to measuring the value see PARA 628 post. The rule has been called artificial: *Usher v Noble* (1810) 12 East 639 at 645 per Lord Ellenborough CJ.

6 *Re Wilson and Scottish Insurance Corp'n* [1920] 2 Ch 28; see PARA 628 post.

7 As to average see PARAS 433-434 post.

8 *Joyce v Kennard* (1871) LR 7 QB 78; see PARA 213 post.

9 Marine Insurance Act 1906 s 46(1); see PARA 322 post.

10 *Shaw v Robberds* (1837) 6 Ad & El 75 at 83 per Lord Denman CJ; see PARA 123 et seq post.

11 *Tannenbaum & Co v Heath* [1908] 1 KB 1032, CA; *Leon v Casey* [1932] 2 KB 576, CA. As to the disclosure of ships' papers see PARA 512 post.

12 As to constructive total loss see PARA 468 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(1) ORIGIN AND COMMON PRINCIPLES/8. Conflict of laws.

8. Conflict of laws.

In cases where a contract of insurance is connected with law of more than one country the law applicable to the contract is to be determined in accordance with a complex series of general and specific statutory provisions¹. Insurance contracts closely connected with an EEA state² are subject to choice of law rules laid down by regulations made under the Financial Services and Markets Act 2000³. The law applicable to other insurance contracts, and to all reinsurance agreements irrespective of any connection with an EEA state is to be ascertained by the application of the principles in the Rome Convention 1980⁴ as implemented into English law by the Contracts (Applicable Law) Act 1990, and may be summarised as follows.

- 8 (1) Choice of law rules for a contract of general insurance⁵ insuring a risk situated within an EEA state are set out in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001⁶. The place of the situation of a risk within an EEA state means: (a) if the contract relates to buildings or to buildings and their contents (in so far as the contents are covered by the same contract of insurance), the EEA state in which the property is situated⁷; (b) if the contract relates to vehicles of any type, the EEA state of registration⁸; (c) if the contract covers travel or holidays risks and has a duration of four months or less, the EEA state in which the policyholder entered into the contract⁹; and (d) in any other case, if the policyholder is an individual, the EEA state in which he resides on the date the contract is entered into¹⁰ or, otherwise the EEA state in which the establishment of the policyholder to which the contract relates is situated on that date¹¹.
- 9 (2) A contract of long term insurance¹² is governed by the choice of law rules in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001¹³ where (a) if the policyholder is an individual, he resides in an EEA state¹⁴; (b) otherwise, the establishment of the policyholder to which the contract relates is situated in an EEA state¹⁵.
- 10 (3) A non-life policy insuring a risk located outside a member state of the European Union is governed by the Rome Convention.
- 11 (4) A life policy insuring a commitment located outside a member state of the European Union is governed by the Rome Convention.
- 12 (5) Reinsurance agreements are governed by the Rome Convention, as they are excluded from the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001¹⁶.

The English courts have jurisdiction over an insurance or reinsurance dispute in accordance with the ordinary provisions of Civil Procedure Rules¹⁷. However, if the defendant is domiciled within the member states of the European Union or some other signatory country, jurisdiction is to be determined by the rules set out in the Brussels Regulation¹⁸ or the almost parallel provisions of the Lugano Convention 1988. Where the Regulation or the Convention applies, there are special jurisdiction rules affecting matters relating to insurance, the general effect of which is to prevent the insured from being sued in any place other than the state of his domicile but to allow him to sue the insurers in a number of possible places, depending upon the insurer's domicile and the situation of the risk. The special insurance rules apply to all insurance contracts, whether the policyholder is an individual or a commercial undertaking but

they do not apply to reinsurance contracts which are governed by the ordinary jurisdiction rules in the Regulation or the Convention.

1 As to these provisions and conflict of laws generally see CONFLICT OF LAWS.

2 'EEA state' means a state which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 May 1992 as it has effect for the time being: Financial Services and Markets Act 2000 Sch 3 para 8. At the date at which this volume states the law the following are EEA states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom.

3 Ie the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635 (amended by SI 2001/3542). The regulations implement into English law the second generation of EC Insurance Directives. Where an EEA state, including the United Kingdom, includes several territorial units, each of which has its own laws concerning contractual obligations, each unit is to be considered as a separate state for the purposes of identifying the applicable law under the regulations: Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 2(4). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

4 Ie the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and signed by the United Kingdom on 7 December 1981.

5 For the meaning of 'contract of general insurance' see PARA 21 post.

6 See the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, regs 4-7.

7 Ibid reg 2(2)(a).

8 Ibid reg 2(2)(b).

9 Ibid reg 2(2)(c).

10 Ibid reg 2(2)(d)(i). References to the country in which a person resides are (1) if he is an individual, to the country in which he has his habitual residence; (2) in any other case, to the country in which he has his central administration: reg 2(3).

11 Ibid reg 2(2)(d)(ii).

12 For the meaning of 'contract of long term insurance' see PARA 21 post.

13 Ie the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, regs 8-10.

14 Ibid reg 8(1)(a).

15 Ibid reg 8(1)(b).

16 Ibid reg 3(1).

17 See CPR 6.20; and CIVIL PROCEDURE vol 11 (2009) PARA 170.

18 Ie Council Regulation (EC) 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L012, 16.01.2001, p 1).

UPDATE

8 Conflict of laws

TEXT AND NOTES--SI 2001/2635 is limited to contracts of insurance entered into before 17 December 2009: see reg 3 (amended by SI 2009/3075).

NOTE 8--If the contract of insurance relates to a vehicle dispatched from one EEA state to another, in respect of the period of 30 days beginning with the day on which the purchaser accepts delivery a reference to the EEA state in which a risk is situated is a reference to the state of destination (and not, as provided by SI 2001/2635 reg 2(2)(b), to the state of registration): reg 2(2A) (added by SI 2007/2403).

NOTE 17--CPR Pt 6 substituted: SI 2008/2178.

NOTE 18--In determining jurisdiction, a court must look at all the documentation to establish the parties' intentions, and any document establishing jurisdiction if a specific risk eventuates is likely to prevail over any general terms: *Evialis SA v SIAT* [2003] EWHC 863 (Comm), [2004] Lloyd's Rep IR 187.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(2) CLASSIFICATION OF INSURANCE BUSINESS AND INSURERS/9. Main types of risk.

(2) CLASSIFICATION OF INSURANCE BUSINESS AND INSURERS

9. Main types of risk.

For convenience the different types of insurance business may be classified as follows: (1) marine, aviation and transport insurance¹; (2) long term insurance²; (3) personal accident insurance³; (4) property insurance⁴; (5) liability insurance⁵; (6) motor vehicle insurance⁶; (7) pecuniary loss insurance⁷; (8) war risks insurance⁸; and (9) industrial assurance⁹.

The liability of an insurer either generally or under a particular contract of insurance may itself be insured against, and such insurance is known as 'reinsurance'¹⁰.

1 As to marine, aviation and transport insurance see PARA 215 et seq post.

2 As to long term insurance business see PARA 525 et seq post.

3 As to personal accident insurance see PARA 567 et seq post.

4 As to property insurance see PARA 591 et seq post.

5 As to liability insurance see PARA 660 et seq post.

6 As to motor vehicle insurance see PARA 706 et seq post.

7 As to pecuniary loss insurance see PARA 780 et seq post.

8 As to war risks insurance see PARA 808 et seq post.

9 See INDUSTRIAL ASSURANCE vol 24 (Reissue) PARA 201 et seq.

10 The principles applicable to contracts of reinsurance are the same as those applicable to contracts of insurance generally, with certain provisions particularly applicable to marine insurance: see further PARAS 385, 766-779 post. Problems of conflict of laws may arise where the policies of insurance and reinsurance are governed by different proper laws: see PARA 774 text and note 4 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(2) CLASSIFICATION OF INSURANCE BUSINESS AND INSURERS/10. Social security and war insurance.

10. Social security and war insurance.

As a matter of national policy the state undertakes the responsibility of providing on an insurance basis benefits for unemployment¹, incapacity, maternity, widows and widowers, retirement, death and industrial injuries and diseases².

There is statutory provision for insurance and reinsurance against war risks of ships, aircraft and cargoes, and for insurance of goods lost or damaged in transit after discharge and between the ship or aircraft and the destination of the goods³.

1 See the Jobseekers Act 1995; and SOCIAL SECURITY AND PENSIONS.

2 See the Social Security Contributions and Benefits Act 1992 ss 30A-30E (as added) (incapacity), s 35 (as amended) (maternity), ss 36-42 (as amended) (widows and widowers), ss 43-55C (as amended) (retirement), ss 94-110 (as amended) (industrial injuries and diseases); and SOCIAL SECURITY AND PENSIONS. This does not affect the ability of individuals and insurers to enter into contracts of insurance covering these matters.

3 See the Marine and Aviation Insurance (War Risks) Act 1952 ss 1-3; and PARA 808 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(2) CLASSIFICATION OF INSURANCE BUSINESS AND INSURERS/11. Classification of insurers as legal entities.

11. Classification of insurers as legal entities.

At one time insurers tended to specialise in one particular kind of business such as life, fire or marine insurance, but today most insurers carry on several kinds. A classification of insurers based on the kind of business they carry on is, therefore, an unsatisfactory one. From a legal point of view insurers are best classified as follows, by having regard to the different modes in which they are constituted, privileged or governed:

- 13 (1) companies incorporated by registration in pursuance of the Companies Acts¹;
- 14 (2) companies incorporated by special Act of Parliament;
- 15 (3) companies incorporated by royal charter²;
- 16 (4) unincorporated companies and associations on which certain privileges incident to corporations created by royal charter and certain other powers have been conferred by letters patent or by special statute³;
- 17 (5) unincorporated and unprivileged companies which are large partnerships generally formed by deeds of settlement⁴;
- 18 (6) collecting societies⁵ and other friendly societies⁶; and
- 19 (7) industrial assurance companies⁷.

1 As to the Companies Acts see COMPANIES vol 14 (2009) PARA 24 et seq. Companies registered under Acts prior to the Companies Act 1985 are regulated by that Act even though they are not companies registered under it: see COMPANIES vol 14 (2009) PARA 24. For the purposes of the Companies Act 1985, a company which carries on the business of insurance in common with any other business or businesses is deemed to be an insurer: s 720(5) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 27(1), (3)).

2 The charters of insurance companies have generally been granted in pursuance of some special statute: see *Elve v Boyton* [1891] 1 Ch 501, CA; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1128.

3 See COMPANIES vol 14 (2009) PARA 3 et seq. See also PARA 24 post as to Lloyd's underwriters.

4 As to the limitation on the number of members see PARTNERSHIP vol 79 (2008) PARA 29 et seq.

5 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2088.

6 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081 et seq.

7 See INDUSTRIAL ASSURANCE.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(2) CLASSIFICATION OF INSURANCE BUSINESS AND INSURERS/12. Classification of insurers by offices.

12. Classification of insurers by offices.

The following classification is rather of offices than of companies:

- 20 (1) proprietary offices, being joint stock partnerships the partners of which take all the profits;
- 21 (2) offices in which the shareholders take all the profits except the sums paid by way of bonus or rebate to policyholders who are not partners; and
- 22 (3) mutual insurance offices, where the policyholders are the only proprietors and the whole body insures each of its members for their protection and not its profit¹.

1 As to mutual insurance offices see PARA 27 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/13. Marine legislation.

(3) INSURANCE LEGISLATION AND RELATED LEGISLATION

13. Marine legislation.

The law of marine insurance was codified by the Marine Insurance Act 1906¹. The Marine Insurance (Gambling Policies) Act 1909 prohibits gambling on loss by maritime perils².

1 As to the Marine Insurance Act 1906 see PARA 215 et seq post.

2 As to the Marine Insurance (Gambling Policies) Act 1909 see PARA 387 post. The two Acts may be cited together as the Marine Insurance Acts 1906 and 1909: Marine Insurance (Gambling Policies) Act 1909 s 2.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/14. Scope of the codification.

14. Scope of the codification.

The Marine Insurance Act 1906 codifies only those principles of the law which relate exclusively to marine insurance. It does not lay down rules which apply to contracts in general such as those relating to fraud, mistake or illegality, or those relating to special subjects which belong more properly to other departments of law such as shipping and navigation, prize and international law. It expressly provides that the rules of the common law, including the law merchant¹, except in so far as they are inconsistent with the express provisions of the Act, continue to apply to contracts of marine insurance².

1 As to the law merchant see PARA 2 note 4 ante.

2 Marine Insurance Act 1906 s 91(2).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/15. Construction.

15. Construction.

The canon of construction generally applicable to a codifying statute is that the language of the statute must be given its natural meaning, regard being had to the previous state of the law only in cases of doubt or ambiguity¹. Although this has sometimes been applied to the Marine Insurance Act 1906², that Act embodies only some of the legal principles and rules of marine insurance, and its language is so extremely concise and general that its full import and meaning can scarcely be understood without referring to the existing law which it was intended to express or to the decided cases from which that law was evolved³. Moreover, it is often left in doubt whether or not that law was intended to be altered. Where this is so, the courts will apparently hold that the Act was not intended to alter the pre-existing law⁴. For these reasons it will generally be necessary, notwithstanding the general canon of construction, to ascertain the law as it stood at that date and to illustrate it by decided cases⁵.

1 *Bank of England v Vagliano Bros* [1891] AC 107 at 144, HL; *Robinson v Canadian Pacific Rly Co* [1892] AC 481, PC; *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831 at 836, CA; *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49 at 75, [1976] 3 All ER 243 at 257, CA, per Roskill LJ; and see STATUTES.

2 See *Hall v Hayman* [1912] 2 KB 5 at 12; *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922 at 936, CA; *P Samuel & Co Ltd v Dumas* [1924] AC 431 at 451, HL.

3 See *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50 at 79, [1941] 3 All ER 62 at 76, HL, per Lord Wright.

4 *Sanday & Co v British and Foreign Marine Insurance Co Ltd* [1915] 2 KB 781 at 811, 831, CA (affd sub nom *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650 at 673, HL); *Gaunt v British and Foreign Insurance Co Ltd and Standard Marine Insurance Co Ltd* [1920] 1 KB 903 at 915, CA; (affd sub nom *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 48, 64, HL).

5 After the language has been examined without presumptions, resort may be had to the previous law for construing provisions of doubtful import or words which have previously acquired a technical meaning: *Bank of England v Vagliano Bros* [1891] AC 107 at 145, HL, per Lord Herschell.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/16. Other insurance legislation.

16. Other insurance legislation.

The Life Assurance Act 1774 provides that insurance may not be effected on a person's life or any other event if the person for whose use or benefit it is effected has no interest in it; nor may it be effected by way of gaming or wagering¹. The Policies of Assurance Act 1867 provides that, if certain conditions are fulfilled, an assignee of a life assurance policy may sue at law in his own name to recover the sum insured from the insurer concerned after due written notice of the assignment has been given². The Life Insurance Companies (Payment into Court) Act 1896 provides that in the case of life assurance policies where the right to the policy money is in doubt and there are competing claims, the insurers can discharge themselves by paying the money into court³.

Other Acts are: the Restriction of Advertisement (War Risks Insurance) Act 1939⁴; the Marine and Aviation Insurance (War Risks) Act 1952 which entitles the Secretary of State to reinsure any war risks and to carry on insurance against war risks⁵; and the Reinsurance (Acts of Terrorism) Act 1993 which provides that reinsurance obligations of the Secretary of State arising from acts of terrorism may be met out of money provided by Parliament⁶.

1 See the Life Assurance Act 1774 s 1; and PARAS 535-536 post. Such insurance is void: s 1.

2 See the Policies of Assurance Act 1867 ss 1, 3; and PARA 548 post.

3 See the Life Insurance Companies (Payment into Court) Act 1896 s 3 (as amended); and PARA 561 post.

4 See the Restriction of Advertisement (War Risks) Act 1939; and PARA 808 post.

5 See the Marine and Aviation Insurance (War Risks) Act 1952 s 1(1); and PARA 812 post.

6 See the Reinsurance (Acts of Terrorism) Act 1993 s 1; and PARA 820 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/17. Insurance companies legislation.

17. Insurance companies legislation.

The Insurance Companies Amendment Act 1973, in so far as it is not repealed, validates certain group insurance policies¹.

The Financial Services and Markets Act 2000 places restrictions on the carrying on of insurance business² and provides for its regulation and conduct³. The Financial Services Authority⁴ is responsible for the operation of the Act.

1 See the Insurance Companies Amendment Act 1973 s 50; and PARA 536 text and note 3 post.

2 See PARA 22 et seq post.

3 See PARAS 31-35, 821 post.

4 The Financial Services Authority is a body corporate having the functions conferred on it by or under the Financial Services and Markets Act 2000: s 1(1); see PARA 821 post and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/18. Related legislation.

18. Related legislation.

The Consumer Credit Act 1974 does not regulate a consumer credit agreement where the creditor is of a description specified in an order made by the Secretary of State as being an insurer¹.

The European Communities Act 1972 empowers Her Majesty by Order in Council and any designated minister or department to make provision for implementing any Community obligation or enabling such obligation to be implemented or enabling any rights to be enjoyed by the United Kingdom² under or by virtue of the treaties to be exercised³.

The Sex Discrimination Act 1975⁴, the Race Relations Act 1976⁵ and the Disability Discrimination Act 1995⁶ all contain provisions making it unlawful for a person concerned with the provision of facilities or services to the public or a section of the public, including facilities by way of insurance, to discriminate against a person who seeks to obtain or use those facilities or services by refusing to provide or deliberately not providing those facilities or services, or in the manner in which, or terms on which they are provided.

Other legislation which does not contain specific provisions relating to insurance but which may have an impact is the Deregulation and Contracting Out Act 1994⁷ and the Regulatory Reform Act 2001⁸.

1 Consumer Credit Act 1974 s 16(1)(a) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 165(1), (2)(a)).

2 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

3 European Communities Act 1972 s 2(2)(a). See eg the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245, which implement EC Council Directive 91/674 (OJ L374, 31.12.91, p 7) on the annual accounts and consolidated accounts of insurance undertakings; see also eg Case C-386/00 *Axa Royale Belge SA v Ochoa and Strategic Finance Sprl* [2002] 2 CMLR 69, ECJ (life insurance) in respect of the obligations of national courts in interpreting domestic legislation implementing a Community directive.

4 Sex Discrimination Act 1975 s 29; and see PARA 71 post.

5 Race Relations Act 1976 s 20; and see PARA 71 post.

6 Disability Discrimination Act 1995 s 19; and see PARA 71 post.

7 The Act enables orders to be made by which any function of a minister or office-holder conferred by or under any enactment, or which may by virtue of any enactment or rule of law be exercised by an officer of his, may be exercised by another person: Deregulation and Contracting Out Act 1994 s 69.

8 The Act enables orders to be made for the purpose of reforming legislation which has the effect of imposing burdens affecting any persons in the carrying on of any activity: Regulatory Reform Act 2001 s 1; and see COMPETITION vol 18 (2009) PARA 380. Codes of practice may also be issued setting out recommended practice in relation to the enforcement of any restriction, requirement or condition imposed by any enactment: s 9.

UPDATE

18 Related legislation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4,

Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--1972 Act s 2(2)(a) amended: Legislative and Regulatory Reform Act 2006 s 27(1)(a). *Axa Royale Belge*, cited, reported at [2003] 1 All ER (Comm) 115. SI 1993/3245 replaced: Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565.

TEXT AND NOTE 8--2001 Act replaced: see now the Legislative and Regulatory Reform Act 2006.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(3) INSURANCE LEGISLATION AND RELATED LEGISLATION/19. Insurance and taxation.

19. Insurance and taxation.

Various Acts governing taxation contain provisions relating to insurance. The provision of insurance of any description and the making of arrangements for the provision of any insurance are exempt from value added tax¹. No capital gain accrues on the disposal of either the rights of the insurer or the rights of the insured under any policy of insurance, whether the risks relate to property or not². Premiums or other payments made under a policy of insurance against the risk of any kind of damage or injury to or loss or depreciation of an asset are excluded from the expenditure which may be allowed in computing the gain or loss on the disposal of an asset³. There are special provisions for the taxation of underwriters⁴ and for the surrender or conversion of life policies⁵. Inheritance tax may be attracted in case of insurance⁶.

The Income and Corporation Taxes Act 1988 sets out the position as to income taxation and the basis of computation of corporation tax in so far as insurance is concerned⁷.

Insurance premium tax is charged on the receipt of a premium by an insurer⁸.

1 Value Added Tax Act 1994 s 31, Sch 9 Pt II Group 2 (amended by the Finance Act 1997 s 38(1), and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 347). See VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 160.

2 Taxation of Chargeable Gains Act 1992 s 204; and see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARAS 386-387.

3 Ibid ss 38(2), 205; and see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARAS 33, 386.

4 See the Income and Corporation Taxes Act 1988 ss 450-457 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1446 et seq.

5 Ibid ss 268, 269; and see INCOME TAXATION vol 23(2) (Reissue) PARAS 1026-1030.

6 Inheritance Tax Act 1984 ss 21, 152, 263 (ss 21, 152 as amended); and see INHERITANCE TAXATION vol 24 (Reissue) PARAS 518, 410, 626 respectively.

7 Income and Corporation Taxes Act 1988 ss 266, 273, 274, Pt XIII Ch II (ss 539-554) (as amended); and see INCOME TAXATION vol 23(2) (Reissue) PARAS 1016-1030, 1497 et seq.

8 Finance Act 1994 Pt III (ss 48-74) (as amended). As to insurance premium tax see PARA 831 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(i) Application of the Legislation/A. IN GENERAL/20. Common law.

(4) AUTHORISED INSURERS

(i) Application of the Legislation

A. IN GENERAL

20. Common law.

All persons competent to contract¹ may be parties to any contract of insurance and a policy may be underwritten by individuals or by a company. This position is, however, subject to the restrictions imposed by the Financial Services and Markets Act 2000².

1 As to who is competent to contract see CONTRACT vol 9(1) (Reissue) PARA 630.

2 As to those restrictions see PARAS 22, 31 et seq post. See also FINANCIAL SERVICES AND INSTITUTIONS.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(i) Application of the Legislation/A. IN GENERAL/21. Meaning of 'contract of insurance'.

21. Meaning of 'contract of insurance'.

For the purposes of regulation under the Financial Services and Markets Act 2000 'contract of insurance' means any contract of insurance which is a contract of long term insurance or a contract of general insurance¹, and includes:

- 23 (1) fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds or similar contracts of guarantee, where these are:
 - 1
 - 1. (a) effected or carried out by a person not carrying on a banking business;
 - 2. (b) not effected merely incidentally to some other business carried on by the person effecting them; and
 - 3. (c) effected in return for the payment of one or more premiums;
 - 2
 - 24 (2) tontines;
 - 25 (3) capital redemption contracts or pension fund management contracts, where these are effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of either effecting a contract of insurance as principal² or carrying out a contract of insurance as principal³;
 - 26 (4) contracts to pay annuities on human life⁴;
 - 27 (5) contracts in the nature of collective insurance, as referred to in the First Life Insurance Directive⁵; and
 - 28 (6) contracts in the nature of social insurance, as referred to in the First Life Insurance Directive⁶,

but does not include a funeral plan contract⁷.

'Contract of long term insurance' means a contract of insurance in respect of any of the following⁸: life and annuity⁹; marriage and birth¹⁰; linked long term¹¹; permanent health¹²; tontines¹³; capital redemption¹⁴; pension fund management¹⁵; collective insurance¹⁶; and social insurance¹⁷.

'Contract of general insurance'¹⁸ means a contract of insurance in respect of any of the following: accident¹⁹; sickness²⁰; land vehicles²¹; railway rolling stock²²; aircraft²³; ships²⁴; goods in transit²⁵; fire and natural forces²⁶; damage to property²⁷; motor vehicle liability²⁸; aircraft liability²⁹; liability of ships³⁰; general liability³¹; credit³²; suretyship³³; miscellaneous financial loss³⁴; legal expenses³⁵; and assistance³⁶.

1 A contract of insurance is to be treated as a contract of long term insurance, notwithstanding the fact that it contains related and subsidiary provisions such that it might also be regarded as being a contract of general insurance, if its principal object is that of a contract of long term insurance and it is effected or carried out by an authorised person who has permission to effect or carry out life and annuity contracts: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(3). As to the meaning of 'life and annuity' contracts see note 9 infra.

2 Being the kind of activity specified in *ibid* art 10(1).

3 Being the kind of activity specified in *ibid* art 10(2).

4 'Annuities on human life' does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged, or who have been engaged, in any particular profession, trade or employment, or of the dependants of such persons: *ibid* art 3(1).

5 *le* the First Life Co-ordination Directive (EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance) art 1(2)(e), which refers to the operations carried out by insurance companies such as those referred to in Chapter 1, Title 4 of Book IV of the French 'Code des assurances': see now EC Parliament and Council Directive 2002/83 (OJ L345, 19.12.02, p 1) art 2(2)(e).

6 *le* in EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) art 1(3), which refers to operations relating to the length of human life which are prescribed by or provided for in social insurance legislation, when they are effected or managed at their own risk by assurance undertakings in accordance with laws of a member state: see now EC Parliament and Council Directive 2002/83 (OJ L345, 19.12.02, p 1) art 2(3).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1). A 'funeral plan contract' is a contract under which a person ('the customer') makes one or more payments to another person ('the provider') and the provider undertakes to provide, or secure that another person provides, a funeral in the United Kingdom for the customer (or some other person who is living at the date when the contract is entered into) on his death unless, at the time of entering into the contract, the customer and the provider intend or expect the funeral to occur within one month. A plan is not a funeral plan contract where (1) the provider undertakes to secure that sums paid by the customer under the contract will be applied towards a contract of whole life insurance on the life of the customer (or other person for whom the funeral is to be provided), effected and carried out by an authorised person who has permission to effect and carry out such contracts of insurance, for the purpose of providing the funeral; or (2) the provider undertakes to secure that sums paid by the customer under the contract will be held on trust for the purpose of providing the funeral, and the trust meets certain specified requirements: arts 59, 60.

8 *Ibid* art 3(1).

9 *le* contracts of insurance on human life or contracts to pay annuities on human life, but excluding (in each case) linked long term contracts of insurance: *ibid* Sch 1 Pt II para I. As to the meaning of 'linked long term contracts' see note 11 *infra*; as to annuities on human life see note 4 *supra*.

10 *le* contracts of insurance to provide a sum on marriage or on the birth of a child, and being expressed to be in effect for a period of more than one year: *ibid* Sch 1 Pt II para II.

11 *le* contracts of insurance on human life or contracts to pay annuities on human life where the benefits are wholly or partly to be determined by reference to the value of, or the income from, property of any description (whether or not specified in the contracts) or by reference to fluctuations in, or in an index of, the value of property of any description (whether or not so specified): *ibid* Sch 1 Pt II para III. 'Property' includes currency of the United Kingdom or any other country or territory: art 3(1).

12 *le* contracts of insurance providing specified benefits against risks of persons becoming incapacitated in consequence of sustaining injury as a result of an accident or of an accident of a specified class or of sickness or infirmity, being contracts that:

- 1 (1) are expressed to be in effect for a period of not less than five years, or until the normal retirement age for the persons concerned, or without limit of time; and
- 2 (2) either are not expressed to be terminable by the insurer, or are expressed to be so terminable only in special circumstances mentioned in the contract: *ibid* Sch 1 Pt II para IV.

As to the meaning of 'without limit of time' see *Manchester and Salford Hospital Saturday Fund v Customs and Excise Comrs* [1999] STC 649.

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt II para V.

14 *le* capital redemption contracts, where effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of effecting a contract of insurance as principal or of carrying out a contract of insurance as principal: *ibid* Sch 1 Pt II para VI.

15 *le* (1) pension fund management contracts; and (2) pension fund management contracts which are combined with contracts of insurance covering either conservation of capital or payment of a minimum interest, where effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of effecting a contract of insurance as principal or of carrying out a contract of insurance as principal: *ibid* Sch 1 Pt II para VII. A 'pension fund management contract' means a contract to manage the investments of pension funds (other than funds solely for the benefit of the officers or employees of the person

effecting or carrying out the contract and their dependants or, in the case of a company, partly for the benefit of officers and employees and their dependants of its subsidiary or holding company or a subsidiary of its holding company): art 3(1). 'Subsidiary' and 'holding company' have the same meaning as in the Companies Act 1985 s 736: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1).

16 le contracts of a kind referred to in the First Life Insurance Directive (ie EEC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance) art 1(2)(e): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt II para VIII; and see note 5 supra.

17 le contracts of a kind referred to in the First Life Insurance Directive (ie EEC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance) art 1(3): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt II para IX; and see note 6 supra.

18 Ibid art 3(1).

19 le contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity or a combination of both against risks of the person insured (or, in the case of a contract made by virtue of the Local Government Act 1972 s 140 (as amended), s 140A (as added and amended) or s 140B (as added and amended) (insurance of members and voluntary assistants of local authorities and voluntary assistants of probation committees; see LOCAL GOVERNMENT vol 69 (2009) PARAS 224-225) a person for whose benefit the contract is made):

3 (1) sustaining injury as the result of an accident or of an accident of a specified class; or

4 (2) dying as a result of an accident or of an accident of a specified class; or

5 (3) becoming incapacitated in consequence of disease or of disease of a specified class,

including contracts relating to industrial injury and occupational disease but excluding contracts relating to sickness or permanent health: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt I para 1. For sickness see note 20 infra; for permanent health see note 12 supra.

20 le contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity (or a combination of both) against risks of loss to the persons insured attributable to sickness or infirmity but excluding contracts relating to permanent health: ibid Sch 1 Pt I para 2. For permanent health see note 12 supra.

21 le contracts of insurance against loss of or damage to vehicles used on land, including motor vehicles but excluding railway rolling stock: ibid Sch 1 Pt I para 3.

22 le contracts of insurance against loss of or damage to railway rolling stock: ibid Sch 1 Pt I para 4.

23 le contracts of insurance upon aircraft or upon the machinery, tackle, furniture or equipment of aircraft: ibid Sch 1 Pt I para 5.

24 le contracts of insurance upon vessels used on the sea or on inland water, or upon the machinery, tackle, furniture or equipment of such vessels: ibid Sch 1 Pt I para 6.

25 le contracts of insurance against loss of or damage to merchandise, baggage and all other goods in transit, irrespective of the form of transport: ibid Sch 1 Pt I para 7.

26 Contracts of insurance against loss of or damage to property (other than property to which ibid Sch 1 Pt I paras 3-7 relate) due to fire, explosion, storm, natural forces other than storm, nuclear energy or land subsidence: Sch 1 Pt I para 8.

27 Contracts of insurance against loss of or damage to property (other than property to which ibid Sch 1 Pt I paras 3-7 relate) due to hail or frost or any other event (such as theft) other than those mentioned in PARAS 8: Sch 1 Pt I para 9.

28 Contracts of insurance against damage arising out of or in connection with the use of motor vehicles on land, including third party risks and carrier's liability: ibid Sch 1 Pt I para 10.

29 Contracts of insurance against damage arising out of or in connection with the use of aircraft, including third party risks and carrier's liability: ibid Sch 1 Pt I para 11.

30 le contracts of insurance against damage arising out of or in connection with the use of vessels on the sea or on inland water, including third party risks and carrier's liability: ibid Sch 1 Pt I para 12.

31 le contracts of insurance against risks of the persons insured incurring liabilities to third parties, the risks in question not being risks to which *ibid* Sch 1 Pt I para 10, 11 or 12 relates: Sch 1 Pt I para 13.

32 le contracts of insurance against risks of loss to the persons insured arising from the insolvency of debtors of theirs or from the failure (otherwise than through insolvency) of debtors of theirs to pay their debts when due: *ibid* Sch 1 Pt I para 14.

33 le the following contracts:

- 6 (1) contracts of insurance against the risks of loss to the persons insured arising from their having to perform contracts of guarantee entered into by them;
- 7 (2) fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee, where these are:
 - 1. (a) effected or carried out by a person not carrying on a banking business;
1
 - 2. (b) not effected merely incidentally to some other business carried on by the person effecting them;
and
2
 - 3. (c) effected in return for the payment of one or more premiums: *ibid* Sch 1 Pt I para 15.
3

34 le contracts of insurance against any of the following risks:

- 8 (1) risks of loss to the persons insured attributable to interruptions of the carrying on of business carried on by them or to reduction of the scope of business so carried on;
- 9 (2) risks of loss to the persons insured attributable to their incurring unforeseen expense (other than loss such as is covered by contracts falling within *ibid* Sch 1 Pt I para 18);
- 10 (3) risks which do not fall within heads (1) and (2) *supra* and which are not of a kind such that contracts of insurance against them fall within any other provision of Schs 1: Sch 1 Pt I para 16.

35 le contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation): *ibid* Sch 1 Pt I para 17.

36 le contracts of insurance providing either or both of the following benefits, namely:

- 11 (1) assistance (whether in cash or in kind) for persons who get into difficulties while travelling, while away from home or while away from their permanent residence; or
- 12 (2) assistance (whether in cash or in kind) for persons who get into difficulties otherwise than as mentioned in head (1) *supra*: *ibid* Sch 1 Pt I para 18.

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22. Statutory restrictions on carrying on insurance business.

No person may effect or carry out a contract of insurance¹ in the United Kingdom², or purport to do so, unless he is an authorised person³ or an exempt person⁴.

A person who contravenes this prohibition is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum⁵, or both. On conviction on indictment, he is liable to imprisonment for a term not exceeding two years or a fine, or both⁶. It is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence⁷.

A person who is neither an authorised person nor, in relation to the regulated activity in question, an exempt person is guilty of an offence if he:

- 29 (1) describes himself (in whatever terms) as an authorised person;
- 30 (2) describes himself (in whatever terms) as an exempt person in relation to the regulated activity; or
- 31 (3) behaves, or otherwise holds himself out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is an authorised person, or an exempt person in relation to the regulated activity⁸.

A person who contravenes this provision is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale⁹, or both¹⁰. However where the conduct constituting the offence involved or included the public display of any material, the maximum fine for the offence is level 5 on the standard scale multiplied by the number of days for which the display continued¹¹. It is a defence to these offences for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence¹².

An authorised person who carries on a regulated activity in the United Kingdom, or purports to do so, otherwise than in accordance with permission¹³ contravenes the statutory provisions¹⁴. The contravention does not make the person guilty of an offence; make any transaction void or unenforceable; or, save in prescribed cases¹⁵, give rise to any right of action for breach of statutory duty¹⁶.

1 For the meaning of 'contract of insurance' see PARA 21 ante; see also *R v Wilson* [1997] 1 All ER 119, [1997] 1 WLR 1247, CA, where the meaning of effecting and carrying out a contract of insurance was considered.

2 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

3 'Authorised person' means: (1) a person who has a permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to carry on one or more regulated activities; (2) an EEA firm qualifying for authorisation under Sch 3; (3) a Treaty firm qualifying for authorisation under Sch 4; (4) a person who is otherwise authorised by a provision of, or made under, the Act: ss 31(1), (2), 417(1). See FINANCIAL SERVICES AND INSTITUTIONS. An activity is a regulated activity if it is an activity of a specified kind which is carried on by way of business and relates to an investment of a specified kind, or is carried on in relation to property of any kind: s 22(1). 'Investment' includes any asset, right or interest: s 22(4). 'Specified' means specified in an order made by the Treasury: s 22(5).

Effecting a contract of insurance as principal and carrying out a contract of insurance as principal are specified activities: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 10(1), (2). Rights under a contract of insurance are specified investments: art 75. There is excluded from art 10(1) or (2):

- 13 (a) the effecting or carrying out of a contract of insurance by an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) other than through a branch in the United Kingdom and pursuant to a Community co-insurance operation in which the firm is participating otherwise than as the leading insurer; 'community co-insurance operation' and 'leading insurer' have the same meaning as in EC Council Directive 78/473 (OJ L151, 7.6.78, p 25): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11(1), (2).
- 14 (b) the effecting or carrying out, by a person who does not otherwise carry on an activity of the kind specified by the articles, of a contract of breakdown insurance: see art 12.

A contract of breakdown insurance is one under which the benefits provided by that person ('the provider') are exclusively or primarily benefits in kind in the event of accident to or breakdown of a vehicle: art 12(1)(a); a contract does not fail to be a contract of breakdown insurance solely because the provider may reimburse the person entitled to the assistance for all or part of any sums paid by him in respect of assistance either because he failed to identify himself as a person entitled to the assistance or because he was unable to get in touch with the provider in order to claim the assistance: arts 12(1)(b), (4).

The contract must contain the following terms:

- 15 (i) the assistance takes the form of either or both of the specified forms;
- 16 (ii) the assistance is not available outside the United Kingdom and the Republic of Ireland except where it is provided without the payment of additional premium by a person in the country concerned with whom the provider has entered into a reciprocal agreement; and
- 17 (iii) assistance provided in the case of an accident or breakdown occurring in the United Kingdom or the Republic of Ireland is, in most circumstances, provided by the provider's servants: art 12(2).

'The assistance' means the benefits to be provided under a contract of breakdown insurance; 'breakdown' means an event which causes the driver of the relevant vehicle to be unable to start a journey in the vehicle or involuntarily to bring the vehicle to a halt on a journey because of some malfunction of the vehicle or failure of it to function, and after which the journey cannot reasonably be commenced or continued in the relevant vehicle; 'the relevant vehicle' means the vehicle (including a trailer or caravan) in respect of which the assistance is required: art 12(5).

The specified forms of assistance are:

- 18 (A) repairs to the relevant vehicle at the place where the accident or breakdown has occurred; this assistance may also include the delivery of parts, fuel, oil, water or keys to the relevant vehicle: art 12(3)(a);
 - 19 (B) removal of the relevant vehicle to the nearest or most appropriate place at which repairs may be carried out, or to:
4. (aa) the home, point of departure or original destination within the United Kingdom of the driver and passengers, provided the accident or breakdown occurred within the United Kingdom (art 12(3)(b)(i));
4
 5. (bb) the home, point of departure or original destination within the Republic of Ireland of the driver and passengers, provided the accident or breakdown occurred within the Republic of Ireland or within Northern Ireland (art 12(3)(b)(ii));
5
 6. (cc) the home, point of departure or original destination within Northern Ireland of the driver and passengers, provided the accident or breakdown occurred within the Republic of Ireland (art 12(3)(b)(iii)).
6
- 20 This form of assistance may include the conveyance of the driver or passengers of the relevant vehicle, with the vehicle, or (where the vehicle is to be conveyed only to the nearest or most appropriate place at which repairs may be carried out) separately, to the nearest location from which they may continue their journey by other means: art 12(3)(b).

4 Financial Services and Markets Act 2000 s 19(1). 'Exempt person', in relation to a regulated activity, means a person who is exempt from the general prohibition in relation to that activity as a result of an exemption order made under s 38(1) or as a result of s 39(1) (exemption of appointed representatives) or s 285(2) or (3) (exemption of recognised investment exchanges and clearing houses): s 417(1). As to authorisation see PARAS 31-35 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 314 et seq.

5 The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Financial Services and Markets Act 2000 s 23(1).

7 Ibid s 23(3).

8 Ibid s 24(1).

9 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the time at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of the Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

10 Financial Services and Markets Act 2000 s 24(3).

11 Ibid s 24(4).

12 Ibid s 24(2).

13 Ie permission given to him by the Financial Services Authority under *ibid* Pt IV, or resulting from any other provision, of the Act: s 20(1).

14 Ibid s 20(1).

15 In prescribed cases the contravention is actionable at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty: *ibid* s 20(3). For those cases which have been prescribed see the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256.

16 Financial Services and Markets Act 2000 s 20(2). As to breach of statutory duty see TORT vol 97 (2010) PARA 495 et seq.

UPDATE

22 Statutory restrictions on carrying on insurance business

NOTE 1--See also *Re Whiteley Insurance Consultants* [2008] EWHC 1782 (Ch), [2009] Lloyd's Rep IR 212, [2008] All ER (D) 332 (Jul).

NOTE 9--2000 Act s 128 repealed: Criminal Justice Act 2003 Sch 37 Pt 7.

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23. Contracts contravening statutory restrictions.

An agreement¹ made by a person who is not an authorised person² is unenforceable against the other party³. An agreement⁴ made by an authorised person in the course of carrying on a regulated activity⁵, in consequence of something said or done by a third party who is not an authorised person, is unenforceable against the other party⁶. However, the contravention of the statutory provisions does not make the agreements concerned illegal or invalid to any greater extent than this⁷.

In both cases the other party is entitled to recover any money or other property paid or transferred by him under the agreement, and compensation for any loss sustained by him as a result of having parted with it⁸. However, if that person elects not to perform the agreement, or recovers money paid or other property transferred by him under the agreement, he must repay any money and return any other property received by him under the agreement⁹.

If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow the agreement to be enforced or money and property paid or transferred under the agreement to be retained¹⁰.

1 'Agreement' means an agreement made after 1 December 2001 and the making or performance of which constitutes, or is part of, the regulated activity in question: Financial Services and Markets Act 2000 s 26(3). Contracts made at an earlier date are governed by the equivalent provision of the Financial Services Act 1986 s 132 (repealed) which was retroactive and thus applies to contracts made before that Act came into force: *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791, [1996] 1 WLR 1152, CA.

2 For the meaning of 'authorised person' see PARA 22 note 3 ante.

3 Financial Services and Markets Act 2000 s 26(1). See also FINANCIAL SERVICES AND INSTITUTIONS.

4 'Agreement' means an agreement made after 1 December 2001 and the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the authorised person: *ibid* s 27(3).

5 For the meaning of 'regulated activity' see PARA 22 note 3 ante.

6 Financial Services and Markets Act 2000 s 27(1).

7 *Ibid* s 28(9); and see *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791, [1996] 1 WLR 1152, CA.

8 Financial Services and Markets Act 2000 ss 26(2), 27(2). The amount of compensation recoverable is the amount agreed by the parties, or on the application of either party, the amount determined by the court: s 28(1), (2).

9 *Ibid* s 28(1), (7). If property transferred under the agreement has passed to a third party, a reference to that property is to be read as a reference to its value at the time of its transfer under the agreement: s 28(8).

10 *Ibid* s 28(1), (3). In considering the position the court must, in the case of an agreement of the type first referred to in the text, take into account whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the statutory provisions by making the agreement: s 28(4), (5). In the case of an agreement of the second type the issue for the court is whether the provider knew that the third party was (in carrying on the regulated activity) in contravention: s 28(4), (6).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(i) Application of the Legislation/B. APPLICATION TO LLOYD'S/24. Lloyd's.

B. APPLICATION TO LLOYD'S

24. Lloyd's.

Collective underwriting of marine risks in its modern form originated towards the end of the seventeenth century in the practice of a group of merchants and seafaring men to meet in the coffee house of Edward Lloyd in the City of London. Here any person requiring insurance could find, conveniently assembled, insurers who would each assume a part of his risk. Although the principle of individual responsibility for the part of a risk has not been altered, the early informality of Lloyd's has given way in succeeding years to an increasingly rigorous organisation and control directed by a committee. In 1871 Lloyd's was incorporated by Act of Parliament¹, and in 1911 a further Act² sanctioned the existing although unrecognised practice of underwriting non-marine risks. Other Acts were passed in 1925³ and 1951⁴, and a Council of Lloyd's was established in 1982⁵. Protection for the insured is ensured by the requirement of a deposit by way of security of a minimum sum where both marine and non-marine business is to be transacted, and by a stringent annual audit of each underwriter's accounts⁶.

In addition to its primary function as an incorporated society of individual underwriters, Lloyd's has maintained the practice of Edward Lloyd of providing shipping intelligence by the publication of Lloyd's List and Shipping Gazette. The Society also appoints agents in all the principal ports of the world whose duty it is to forward regularly to it accounts of all departures from and arrivals at their ports as well as of losses and casualties and general information relating to shipping and insurance. These agents are appointed by the Corporation of Lloyd's and are not agents of the underwriters⁷.

Where the policy is personally subscribed by individual underwriters, they sign their names at the foot of the policy, writing opposite to it the sum insured by each⁸. Unless the contrary is expressed, the effect is that each underwriter makes a separate contract with the insured for the amount set opposite his name and the insured acquires a right of action against each separately and not against all jointly⁹.

It is usual for underwriters to associate themselves for business purposes into syndicates. One of the members of the syndicate takes the active part in the business and is given authority to underwrite policies in the names of the other members of the syndicate, who are known as the 'names' and who do not themselves take any active part in the business¹⁰. Underwriting agents owe a duty to names to exercise reasonable skill and care in the advice they give to names and in the management of syndicates¹¹.

1 See the Lloyd's Act 1871.

2 Ie the Lloyd's Act 1911.

3 Lloyd's Act 1925.

4 Lloyd's Act 1951.

5 See the Lloyd's Act 1982.

6 Lloyd's and other underwriters are subject to certain special provisions relating to income tax; see the Finance Act 1993 ss 171-184 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1446 et seq. The Council of Lloyd's is required to prepare an annual account by amalgamating the accounts of syndicates in

which members of Lloyd's participate: see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245 (amended by SI 2001/3649).

7 *Wilson v Salamandra Assurance Co of St Petersburg* (1903) 88 LT 96.

8 Where the underwriting is effected by Lloyd's members, the policies are signed by Lloyd's Policy Signing Office, renamed In-Sure Services Ltd with effect from 1 May 2001, on behalf of numbered syndicates, and the seal of the Signing Office is impressed. A list of the members of the syndicates is attached to the policy.

9 Marine Insurance Act 1906 s 24(2); *Tyser v Shipowners Syndicate (Reinsured)* [1896] 1 QB 135; *Leo Steamship Co Ltd v Corderoy* (1896) 12 TLR 395, CA. See *Society of Lloyd's v Clementson* [1995] 1 CMLR 693, CA, where the Society of Lloyd's was held not to be entitled to be reimbursed by members in respect of payments made from the central fund to meet underwriting commitments of those members which they had failed to meet. See also *Touche Ross & Co v Baker* [1992] 2 Lloyd's Rep 207, HL, where it was held that a clause giving the insured an option to renew insurance did not have to be exercised against all the underwriters or none of them, since the liability of an underwriting member was several not joint.

10 *Thompson v Adams* (1889) 23 QBD 361 at 362 per Mathew J; see also *P and B (Run-Off) Ltd v Woolley* [2002] EWCA Civ 65, [2002] 1 All ER (Comm) 577, relating to the validity of a syndication agreement.

11 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL; see also *Brown v KMR Services Ltd* [1995] 4 All ER 598, CA (duty of care in relation to high risk syndicates). As to the settlement of claims in the litigation known as 'the Lloyd's litigation', see *Cox v Bankside Members Agency* [1995] 2 Lloyd's Rep 437, CA; *Axa Reinsurance (UK) Ltd v Field* [1996] 3 All ER 517, HL; *Society of Lloyd's v Fraser* [1999] Lloyd's Rep IR 156, CA; *Society of Lloyd's v Jaffray* [1999] 1 All ER (Comm) 354, [1999] Lloyd's Rep IR 182; *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545, [1999] Lloyd's Rep IR 329, HL; *McAllister v Society of Lloyd's* [1999] Lloyd's Rep IR 487; *Garrow v Society of Lloyd's* [2000] Lloyd's Rep IR 38, CA; *Price v Society of Lloyd's* [2000] Lloyd's Rep IR 453; *Johnson v Society of Lloyd's* [2002] EWHC 1512 (Comm), [2002] All ER (D) 315 (Jul); *Noel v Poland* [2002] Lloyd's Rep IR 30.

UPDATE

24 Lloyd's

NOTE 5--A number of burdens imposed under the 1982 Act have been removed: Legislative Reform (Lloyd's) Order 2008, SI 2008/3001. See *Law v Society of Lloyd's* [2003] EWCA Civ 1887, (2004) Times, 23 January.

NOTE 6--SI 1993/3245 replaced: Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565.

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25. Application of the Financial Services and Markets Act 2000 to members of Lloyd's.

For the purposes of the Financial Services and Markets Act 2000 Lloyd's is an authorised person¹ with permission to carry on the following kinds of regulated activity²: (1) arranging deals³ in contracts of insurance written at Lloyd's; (2) arranging deals in participation in Lloyd's syndicates⁴; and (3) any activity carried on in connection with, or for the purposes of, either of these⁵.

The Financial Services Authority must keep itself informed about the way in which the market at Lloyd's is supervised and regulated, and the way in which regulated activities are being carried on in the market⁶. The Authority must keep under review the desirability of exercising any of its powers in relation to Lloyd's⁷. The Authority may direct that restrictions under the Act are to apply to any member or members of Lloyd's⁸. The Authority may also direct the Council of Lloyd's to exercise its powers generally, or a specific power, with a view to achieving, or in support of, a specified regulatory objective⁹.

The Treasury may by order provide that the requirements of the Act governing the control of business transfers¹⁰ apply to schemes for the transfer of the whole or any part of the business carried on by one or more members of Lloyd's¹¹.

1 Financial Services and Markets Act 2000 s 315(1). For the meaning of 'authorised person' see PARA 22 note 3 ante.

2 For the meaning of 'regulated activity' see PARA 22 note 3 ante.

3 'Arranging deals' means making, or offering or agreeing to make (1) arrangements with a view to another person buying, selling, subscribing for or underwriting a particular investment; (2) arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments: Financial Services and Markets Act 2000 s 324, Sch 2 Pt 1 para 3.

4 'Participation in Lloyd's syndicates' means the investment of the underwriting capacity of a Lloyd's syndicate, and a person's membership (or prospective membership) of a Lloyd's syndicate: *ibid* s 324, Sch 2 Pt II para 21.

5 *Ibid* s 315(2); Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 56-58. See also FINANCIAL SERVICES AND INSTITUTIONS. A 'former underwriting member' (ie a person ceasing to be an underwriting member of Lloyd's on or any time after 24 December 1996) may carry out each contract of insurance that he has underwritten at Lloyd's whether or not he is an authorised person. The Financial Services Authority may impose on a former underwriting member such requirements as appear to it to be appropriate for the purpose of protecting policyholders against the risk that he may not be able to meet his liabilities: Financial Services and Markets Act 2000 ss 320-322.

6 *Ibid* s 314(1).

7 *Ibid* s 314(2). As to the Authority's powers see PARA 31 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 742.

8 See *ibid* s 316; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 743.

9 See *ibid* s 318; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 745.

10 *Ie* the provisions of *ibid* Pt VII (ss 104-117); see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 590-602.

11 Ibid s 323. An order may also apply to former underwriting members (for the meaning of which see note 5 supra); and see the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001, SI 2001/3626.

UPDATE

25 Application of the Financial Services and Markets Act 2000 to members of Lloyd's

TEXT AND NOTE 11--Financial Services and Markets Act 2000 s 323 amended: SI 2008/1469. As to SI 2001/3626 see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 748.

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C. APPLICATION TO MARINE INSURANCE COMPANIES

26. Marine insurance companies.

In 1719 the Royal Exchange Assurance Corporation and the London Assurance Corporation were incorporated with the exclusive right of making sea insurances in their corporate capacity¹, but this monopoly was taken away in 1824². Soon afterwards a great number of insurance companies were formed, either by charter from the Crown or by special statutes or under the provisions of a partnership deed. After 1862 no company, association or partnership consisting of more than 20 persons formed for the acquisition of gain was legal³, and therefore no marine insurance company or mutual assurance association having more than that number of members was legal, unless registered under the Companies Acts⁴ or formed in pursuance of some other Act or letters patent⁵. This restriction on the number of members has now been removed⁶.

1 6 Geo 1 c 18 (Royal Exchange and London Assurance Corporations) (1719) (repealed).

2 5 Geo 4 c 114 (Marine Assurance) (1824) (repealed).

3 Companies Act 1985 s 716(1) (repealed). As to companies formed before 1862 see 7 & 8 Vict c 110 (Joint Stock Companies) (1844) (repealed); the Companies Act 1862 ss 209, 210 (repealed); *Hambro v Hull and London Fire Insurance Co* (1858) 3 H & N 789; *Re Phoenix Life Assurance Co, Burges and Stock's Case* (1862) 2 John & H 441.

4 As to the Companies Acts see COMPANIES vol 14 (2009) PARA 24 et seq. Companies registered under Acts prior to the Companies Act 1985 are regulated by that Act even though they are not companies registered under it: see COMPANIES vol 14 (2009) PARA 24.

5 See *Hambro v Hull and London Fire Insurance Co* (1858) 3 H & N 789; *Re Phoenix Life Assurance Co, Burges and Stock's Case* (1862) 2 John & H 441; *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA; *Shaw v Benson* (1883) 11 QBD 563, CA; and COMPANIES vol 14 (2009) PARA 33. As to mutual insurance associations see *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (1875) 10 Ch App 542; and PARA 517 et seq post.

6 Regulatory Reform (Removal of 20 Member Limit in Partnerships etc) Order 2002, SI 2002/3203.

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D. APPLICATION TO MUTUAL INSURANCE COMPANIES

27. Origin of mutual insurance clubs.

The monopoly created by the incorporation of the London Assurance Corporation and the Royal Exchange Assurance Corporation¹ gave rise to shipowners' mutual insurance associations or clubs for the insurance of their own vessels. In these clubs each member was both insured and insurer; he was insured as to his own property in the club by all the other members in proportion to their respective properties in it, and he was at the same time an insurer in the proportion of his own property in the club for the property of each of the others, their mutual agreements being the consideration of the contract.

Because of the monopoly of those two insurance companies it was essential to the legality of the mutual insurance clubs that their members should be liable individually only, each for his own proportion and not jointly, or one for others of them². Moreover, the managers of the club had no right of action against a member for premiums³ or for his contribution to losses paid⁴.

¹ See PARA 26 ante.

² See the judgment of Pollock B in *Marine Mutual Insurance Association Ltd v Young* (1880) 43 LT 441; and see also *Harrison v Millar* (1796) 7 Term Rep 340n, cited in *Lees v Smith* (1797) 7 Term Rep 338; *Strong v Harvey* (1825) 3 Bing 304.

³ The premium in the case of a mutual society may consist of the liability to contribute to the losses of other members of the society: *Lion Insurance Association Ltd v Tucker* (1883) 12 QBD 176 at 187, CA; *Great Britain 100 A1 SS Insurance Association v Wyllie* (1889) 22 QBD 710 at 722, CA; *Ocean Iron Steamship Insurance Association Ltd v Leslie* (1887) 22 QBD 722n; and see *Re European Assurance Society, Hort's Case, Grain's Case* (1875) 1 ChD 307 at 315, 321, CA.

⁴ *Gray v Pearson* (1870) LR 5 CP 568; *Evans v Hooper* (1875) 1 QBD 45, CA. There was usually a rule in those clubs requiring the member whose ship or share was mortgaged to produce to the club a contract of guarantee from the mortgagee to answer for all demands that should be made on the member by the club, and this rule was generally so framed as to make the production of the guarantee a condition precedent to the recovery for a loss: *Hughes v Tindall* (1856) 18 CB 98; *Turnbull v Woolfe* (1862) 9 Jur NS 57.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(i) Application of the Legislation/D. APPLICATION TO MUTUAL INSURANCE COMPANIES/28. Registration of mutual insurance associations.

28. Registration of mutual insurance associations.

The monopoly granted to the London Assurance Corporation and the Royal Exchange Assurance Corporation was taken away in 1824¹, and until 1862 no restriction was placed on the formation of mutual associations or joint stock companies to carry on the business of marine insurance. However, the Companies Act 1862 produced the result that, as a marine insurance association is a company for the acquisition of gain within the meaning of that Act², it was, when consisting of more than 20 members, an illegal association unless registered as a company³. As a consequence mutual insurance associations were always registered under the Companies Acts, usually as a company limited by shares or as a company limited by guarantee⁴. The restriction on the number of members has now been removed⁵.

1 5 Geo 4 c 114 (Marine Assurance) (1824) (repealed). As to the monopoly see PARAS 26-27 ante.

2 See the Companies Act 1862 s 4 (repealed).

3 *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (1875) 10 Ch App 542; also *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137 at 145-149, CA. A mutual assurance association formed before 1862 did not require registration even if it consisted of more than 20 persons; such an association is not formed afresh whenever a new member joins it.

4 *Lion Assurance Association Ltd v Tucker* (1883) 12 QBD 176, CA; *Marine Mutual Insurance Association v Young* (1880) 43 LT 441. The Companies Act 1862 s 4 (repealed) only applied to associations formed after the commencement of the Act, and accordingly it was held that a mutual marine insurance association formed in 1847 and reconstituted from year to year since that date was not illegal, though not registered nor incorporated: *May v Jacobs* (1885) 1 TLR 349, CA. As to the income tax liability of mutual insurance associations see INCOME TAXATION vol 23(2) (Reissue) PARA 1389.

5 Regulatory Reform (Removal of 20 Member Limit in Partnerships etc) Order 2002, SI 2002/3203.

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29. Legal character of mutual insurance associations.

In general, it is a mutual insurance association itself¹ which is the insurer, and the insured's right of action is against the association and not against the other members, the consideration or premium for the insurance being his liability to contribute to the losses of the other members and the expenses of the association².

¹ As to the origin of mutual insurance associations see PARAS 27-28 ante.

² See *Lion Insurance Association Ltd v Tucker* (1883) 12 QBD 176 at 187, CA, per Brett MR; *North-Eastern 100A SS Insurance Association v Red S Steamship Co Ltd* (1906) 22 TLR 692, CA. Although a member of a mutual assurance association limited by guarantee may be liable to the association or its members for his proportion of losses to an amount exceeding his guarantee, he is not liable as a contributory in respect of such excess: see *Re Bangor and North Wales Mutual Marine Protection Association, Baird's Case* [1899] 2 Ch 593. In *W R Corfield & Co v Buchanan* (1913) 29 TLR 258, HL, it was held that, on the construction of the memorandum and articles, a mutual insurance company limited by guarantee had power to issue reinsurance policies to non-members, and that the policyholder in question was not a member nor liable to contribute as such in the winding up, notwithstanding that the policy provided that he 'waived any and all rights of attending or voting at the general meetings of the association'.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(i) Application of the Legislation/D. APPLICATION TO MUTUAL INSURANCE COMPANIES/30. Statutory provisions concerning mutual insurance.

30. Statutory provisions concerning mutual insurance.

Where two or more persons mutually agree to insure each other against marine losses, there is said to be a mutual insurance¹.

The provisions of the Marine Insurance Act 1906 relating to the premium² do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium³.

In so far as they may be modified by the agreement of the parties, the provisions of the Act may, in the case of mutual insurance, be modified by the terms of the policies issued by the association, or by the rules and regulations of the association⁴. Subject to the above exceptions, the provisions of the Act apply to a mutual insurance⁵.

1 Marine Insurance Act 1906 s 85(1).

2 *Ibid* ss 52-54; see PARA 271 *et seq post*.

3 *Ibid* s 85(2).

4 *Ibid* s 85(3).

5 *Ibid* s 85(4).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(ii) Authorisation/31. The powers of the Financial Services Authority.

(ii) Authorisation

31. The powers of the Financial Services Authority.

A person¹ wishing to apply for permission to conduct the regulated activity of effecting or carrying out contracts of insurance², or to vary an existing permission, may make an application to the Financial Services Authority³. Any application must be made in such manner as the Authority may direct and contain, or be accompanied by, such other information as the Authority may reasonably require⁴. An application for permission must contain a statement of the regulated activity or activities which the applicant proposes to carry on and give the address of a place in the United Kingdom for service on the applicant of any notice or other document under the Act⁵. An application for the variation of a permission must contain a statement of the desired variation and of the regulated activity or activities which the applicant proposes to carry on if his permission is varied⁶.

The Authority must determine an application within six months of receiving the completed application⁷. If the Authority grants an application it must give the applicant written notice⁸ stating the date from which the permission, or the variation, has effect⁹. The Authority must also give the applicant written notice if it proposes or decides either to refuse an application, or to give or vary a permission subject to limitations, requirements or some other detail different from the application¹⁰. An applicant who is aggrieved by the determination of an application may refer the matter to the Financial Services and Markets Tribunal¹¹.

1 As to who may apply see PARAS 32-34 post.

2 For the meaning of 'regulated activity' see PARA 22 note 3 ante. For the meaning of 'contract of insurance' see PARA 21 ante.

3 Financial Services and Markets Act 2000 ss 40, 44; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 348, 354. As to the Financial Services Authority see PARA 821 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4 et seq.

4 Ibid s 51(3). The Authority may require an applicant to provide information in such form, or to verify it in such a way, as the Authority may direct: s 51(6). At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application: s 51(4). Different directions may be given, and different requirements imposed, in relation to different applications or categories of application: s 51(5).

5 Ibid s 51(1). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

6 Ibid s 51(2).

7 Ibid s 52(1). The Authority may determine an incomplete application if it considers it appropriate to do so; and it must in any event do so within 12 months of the date on which it received the application: s 52(2). The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it: s 52(3).

8 Ibid s 52(4).

9 Ibid s 52(5).

10 Ibid s 52(6)-(9). Where the Authority 'proposes' a particular outcome, it must give the applicant a warning notice. A warning notice must be in writing, state the action which the Authority proposes to take and give reasons for the proposed action. The warning notice must specify a reasonable period (of not less than 28 days,

which period the Authority may extend) within which the person to whom it is given may make representations to the Authority. The Authority must then decide, within a reasonable period, whether to give the person concerned a decision notice: s 387. Where the Authority 'decides' a particular outcome, it must give the applicant a decision notice. A decision notice must be in writing, give the Authority's reasons for the decision and give details of the right to have the matter referred to the Financial Services and Markets Tribunal and the procedure on such a reference: s 388(1). If the decision notice was preceded by a warning notice, the action to which the decision notice relates must be action under the same Part of the Act as the action proposed in the warning notice: s 388(2). As to the imposition by the Authority of limitations etc see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 352.

11 Ibid s 55(1). As to the Tribunal see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 43 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(ii) Authorisation/32. United Kingdom applicants.

32. United Kingdom applicants.

For the regulated activity of effecting or carrying out of contracts of insurance¹ the authorised person² must be a body corporate³ (other than a limited liability partnership), a registered friendly society or a member of Lloyd's⁴.

In giving or varying permission, or imposing or varying any requirement in relation to any permission, the Financial Services Authority must ensure that the person concerned will satisfy, and continue to satisfy, certain conditions in relation to all of the regulated activities for which he has or will have permission⁵. The conditions relate to the following:

- 32 (1) legal status⁶;
- 33 (2) the location of offices⁷;
- 34 (3) whether the person has close links with another person which may prevent effective supervision by the Authority⁸;
- 35 (4) the person having adequate resources to carry on the regulated activity⁹;
- 36 (5) the person being a fit and proper person¹⁰.

1 For the meaning of 'regulated activity' see PARA 22 note 3 ante. For the meaning of 'contract of insurance' see PARA 21 ante.

2 For the meaning of 'authorised person' see PARA 22 note 3 ante.

3 'Body corporate' includes a body corporate constituted under the law of a country or territory outside the United Kingdom: Financial Services and Markets Act 2000 s 417(1).

4 Ibid s 41(1), Sch 6 para 1(1) (amended by the Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 2). See also FINANCIAL SERVICES AND INSTITUTIONS.

5 Financial Services and Markets Act 2000 s 41(2). See also FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 351. This duty does not prevent the Authority, having due regard to that duty, from taking such steps as it considers are necessary, in relation to a particular authorised person, in order to secure its regulatory objective of the protection of consumers: s 41(3). As to the Authority's regulatory objectives see PARA 821 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 6, 8. The conditions are known as the 'threshold conditions': s 41(1); see further FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 351.

6 See ibid Sch 6 para 1 (as amended: see note 4 supra).

7 See ibid Sch 6 para 2.

8 See ibid Sch 6 para 3.

9 See ibid Sch 6 para 4.

10 See ibid Sch 6 para 5.

UPDATE

32 United Kingdom applicants

NOTE 4--Financial Services and Markets Act 2000 Sch 6 para 1 further amended: SI 2002/682.

NOTE 7--2000 Act Sch 6 para 2 amended: SI 2007/126. As to the location of offices where the regulated activity concerned is an insurance mediation activity see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 351.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/1. INTRODUCTION/(4) AUTHORISED INSURERS/(ii) Authorisation/33. Applicants from other member states.

33. Applicants from other member states.

An insurance undertaking¹ with its head office in an EEA state² and which is entitled³ to establish a branch office or provide services in another EEA state, may do so in the United Kingdom⁴ provided certain conditions are met⁵. Once the undertaking has satisfied the conditions it qualifies under the Financial Services and Markets Act 2000 as an authorised person⁶ with permission to effect or carry out contracts of insurance⁷. If such an undertaking carries out any of these activities whilst not qualified for authorisation, the statutory provisions relating to the unenforceability of agreements⁸ do not apply and such agreements are therefore enforceable by the undertaking⁹.

An undertaking whose head office is situated in an EEA state, other than the United Kingdom, and which is recognised under the law of that state as its national but which does not have the rights of entitlement referred to above¹⁰ may qualify as an authorised person under the Act, with permission to effect or carry out contracts of insurance, if it satisfies certain conditions¹¹. On satisfying the conditions an undertaking has permission to carry on each permitted activity through its United Kingdom branch or by providing services in the United Kingdom¹².

1 Ie an undertaking pursuing the activity of direct insurance within the meaning of article 1 of the First Life Insurance Directive (ie EEC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance; but see now the Life Insurance Consolidation Directive (ie EC Parliament and Council Directive 2002/83 (OJ L345, 19.12.02, p 1)) or of the First Non-Life Insurance Directive (ie EEC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) which has received authorisation under the appropriate directive from its home state regulator: Financial Services and Markets Act 2000 s 31(1)(b), Sch 3 paras 3(2), (5), 5(d). National rules which prohibit insurance undertakings from choosing their own assets are contrary to EEC Council Directive 73/239: Case C-241/97 *Criminal Proceedings against Försäkringsaktiebolaget Skandia (publ)* [1999] 2 CMLR 933, ECJ.

2 For the meaning of 'EEA state' see PARA 8 note 2 ante.

3 Ie has the entitlement to establish a branch, or provide services, in an EEA state other than that in which it has its head office in accordance with the Treaty and subject to the conditions of the relevant single market directive: Financial Services and Markets Act 2000 Sch 3 para 7. 'The Treaty' means that establishing the European Community: s 417.

4 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

5 For the establishment of a branch office the conditions are that (1) the Financial Services Authority has received notice from the undertaking's home state regulator that it has given the undertaking consent to establish a branch in the United Kingdom; (2) the notice is given in accordance with the relevant directive, identifies the activities to which consent relates, and includes such other information as may be prescribed; and (3) the undertaking has been informed of the applicable provisions or two months have elapsed since the date when the Authority received the notice: Financial Services and Markets Act 2000 Sch 3 para 13(1).

For the provision of services the conditions are that (a) the undertaking has given its home state regulator notice of its intention to provide services in the United Kingdom; (b) the Authority has received notice from the home state regulator containing such information as may be prescribed; and (c) the home state regulator has informed the undertaking notice has been sent to the Authority: Sch 3 para 14(1).

6 For the meaning of 'authorised person' see PARA 22 note 3 ante.

7 Financial Services and Markets Act 2000 Sch 3 para 15(1). See also FINANCIAL SERVICES AND INSTITUTIONS. An undertaking ceases to qualify for authorisation under the Act if it ceases to be an undertaking, as described in note 1 supra, as a result of having its authorisation withdrawn by its home state regulator, or it ceases to have

an entitlement, as described in note 3 *supra*, in circumstances in which authorisation by its home state regulator is not required: s 34(1).

8 *le ibid* ss 26, 27; see PARA 23 *ante*.

9 *Ibid* Sch 3 para 16.

10 See text and notes 1-3 *supra*.

11 Financial Services and Markets Act 2000 s 31(1)(c), Sch 4 paras 1, 2. The conditions are that (1) the undertaking has received authorisation under the law of its home state to carry on the regulated activity in question; (2) the relevant provisions of the law of the home state afford equivalent protection or satisfy the conditions laid down by a Community instrument for the co-ordination or approximation of laws, regulations or administrative provisions of member states relating to the carrying on of that activity; and (3) the undertaking has no rights of entitlement to carry on that activity in the manner in which it is seeking to carry it on: Sch 4 para 3(1). For the meaning of 'regulated activity' see PARA 22 note 3 *ante*. An undertaking is not to be regarded as having home state authorisation unless its home state regulator has so informed the Authority in writing: Sch 4 para 3(2). Provisions afford equivalent protection if they afford consumers protection which is at least equivalent to that afforded by or under the Act: Sch 4 para 3(3). A certificate issued by the Treasury that the provisions of the law of a particular EEA state afford equivalent protection in relation to the activities specified in the certificate is conclusive evidence of that fact: Sch 4 para 3(4).

12 *Ibid* Sch 4 para 4(1). The permission is to be treated as being on terms equivalent to those to which the undertaking's home state authorisation is subject: Sch 4 para 4(2). An undertaking ceases to qualify for authorisation if its home state authorisation is withdrawn: s 35(1).

UPDATE

33 Applicants from other member states

NOTE 1--Reference to EEC Council Directive 79/267 art 1 is now to European Parliament and Council Directive 2002/83 art 2: 2000 Act Sch 3 para 5(d) (amended by SI 2004/3379). 2000 Act Sch 3 para 3(5) replaced by Sch 3 para 3(8) (substituted by SI 2004/3379).

NOTE 5--2000 Act Sch 3 paras 13(1), 14(1) amended: SI 2007/126.

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34. Applicants from outside the Community.

An undertaking with its head office outside an EEA state¹ and which appears to the Financial Services Authority to be seeking to carry on a regulated activity² relating to insurance business must satisfy additional conditions³. The additional conditions are:

- 37 (1) it must have a representative who is resident in the United Kingdom⁴ and who has authority to bind it in its relations with third parties and to represent it in its relations with the Authority and the courts in the United Kingdom⁵;
- 38 (2) it must be a body corporate entitled under the law of the place where its head office is situated to effect and carry out contracts of insurance⁶;
- 39 (3) it must have in the United Kingdom assets of such value as may be specified⁷;
- 40 (4) unless the regulated activity in question relates solely to reinsurance, it must have made a deposit (of money or securities, as may be specified) of such an amount and with such a person as may be specified, and on such terms and subject to such other provisions as may be specified⁸.

1 For the meaning of 'EEA state' see PARA 8 note 2 ante.

2 For the meaning of 'regulated activity' see PARA 22 note 3 ante.

3 Financial Services and Markets Act 2000 s 41, Sch 6 paras 8(1), (2). The conditions are in addition to those set out in Sch 6 paras 1-5, as to which see PARA 32 text and notes 6-10 ante. The additional conditions are such as may be specified in an order made by the Treasury: Sch 6 para 8(3). The Treasury has made the Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507. See also FINANCIAL SERVICES AND INSTITUTIONS VOL 48 (2008) PARA 351.

4 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

5 The Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(a).

6 Ibid art 3(1)(b)(i). For the meaning of 'contract of insurance' see PARA 21 ante.

7 Ibid art 3(1)(b)(ii). 'Specified' means specified in rules: art 3(4).

8 Ibid art 3(1)(b)(iii). For the meaning of 'specified' see note 7 supra. Where the person concerned is seeking to carry on an activity relating to insurance business in one or more other EEA states (as well as in the United Kingdom), and the Authority and the supervisory authority in the other EEA state or states concerned so agree the reference in condition (3) in the text to the United Kingdom is to be read as a reference to the United Kingdom and the other EEA state or states concerned; and the reference in condition (4) to such a person as may be specified is to be read as a reference to such a person as may be agreed between the Authority and the other supervisory authority or authorities concerned: art 3(2). Conditions (2), (3) and (4) do not apply to a Swiss general insurance company: art 3(1)(b). 'Swiss general insurance company' means a person:

- 21 (1) whose head office is in Switzerland;
- 22 (2) who is authorised by the supervisory authority in Switzerland as mentioned in Article 7.1 of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life insurance, signed at Luxembourg on 10 October 1989;
- 23 (3) who is seeking to carry on, or is carrying on, from a branch in the United Kingdom, a regulated activity consisting of the effecting or carrying out of contracts of insurance of a kind which is subject to that Agreement: art 1(2).

The conditions set out in the Financial Services and Markets Act 2000 Sch 6 paras 3-5 (see PARA 32 text and notes 8-10 ante) (close links; adequate resources; and suitability) are also removed in relation to a Swiss general insurance company: Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(3).

'Supervisory authority' means an authority responsible for supervising persons carrying on insurance business: art 1(2).

UPDATE

34 Applicants from outside the Community

NOTE 8--SI 2001/2507 art 3(3) substituted: SI 2005/680.

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35. Grant, variation and cancellation of permission.

The Financial Services Authority may give permission for an applicant¹ to carry on the regulated activity or activities² to which his application relates or such of them as it may specify in the permission³. In considering an application for permission, or whether to vary or cancel a permission, the Authority may have regard to any person appearing to it to be, or likely to be, in a relationship with the applicant or person given permission which is relevant⁴.

The Authority may incorporate in the description of a regulated activity such limitations⁵ as it considers appropriate; specify a narrower or wider description of regulated activity than that in the application; and give permission for the carrying on of a regulated activity which is not included in the application⁶.

The Authority may include in a permission such requirements as it considers appropriate⁷, including a requirement extending to activities which are not regulated activities⁸. A requirement expires at the end of such period as the Authority may specify in the permission⁹.

A person with a permission may apply to the Authority for the permission to be varied¹⁰ or cancelled¹¹. In an application for variation the Authority may add, remove, or vary the description of, a regulated activity in the permission¹², or cancel or vary a requirement imposed by the permission¹³. The Authority may refuse an application if it appears to it that the interests of consumers, or potential consumers, would be adversely affected if the application were to be granted and that it is desirable in the interests of consumers, or potential consumers, for the application to be refused¹⁴.

The Authority may on its own initiative vary or cancel a person's permission if it appears to it that (1) he is failing, or is likely to fail, to satisfy the conditions required in order to hold a permission¹⁵; (2) he has failed, during a period of at least 12 months, to carry on a regulated activity for which he has a permission; or (3) it is desirable to exercise that power in order to protect the interests of consumers or potential consumers¹⁶. The Authority must give the authorised person written notice of any variation¹⁷ or cancellation¹⁸. A variation may take effect immediately, on a date specified in the notice or, if no date is specified in the notice, when the matter to which the notice relates is no longer open to review¹⁹.

It is an offence for a person, in purported compliance with any requirement imposed by or under the Financial Services and Markets Act 2000, to knowingly or recklessly give the Authority information which is false or misleading in a material particular²⁰.

1 As to applicants see PARAS 32-34 ante.

2 For the meaning of 'regulated activity' see PARA 22 note 3 ante.

3 Financial Services and Markets Act 2000 s 42(2). See also FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 352. If it gives permission, the Authority must specify the permitted regulated activity or activities in such manner as it considers appropriate: s 42(6).

4 Ibid s 49(1). Before giving permission in response to an application made by a person who is connected with an undertaking from an EEA state or cancelling or varying any permission given by it to such a person, the Authority must consult the undertaking's home state regulator. A person ('A') is connected with such an undertaking if A is a subsidiary undertaking, or A is a subsidiary undertaking of a parent undertaking of the undertaking: s 49(2), (3). As to applicants from EEA states see PARA 33 ante.

5 'Limitation' is not defined but the Act gives the example: 'as to circumstances in which the activity may, or may not, be carried on': ibid s 42(7)(a).

6 Ibid s 42(7).

7 Ibid s 43(1). A requirement may, in particular, be imposed so as to require the person concerned to take specified action or to refrain from taking specified action: s 43(2). A requirement may be imposed by reference to the person's relationship with his group or other members of his group: s 43(4). 'Group' means, in relation to a person ('A'), A and any person who is:

- 24 (1) a parent undertaking of A;
- 25 (2) a subsidiary undertaking of A;
- 26 (3) a subsidiary undertaking of a parent undertaking of A;
- 27 (4) a parent undertaking of a subsidiary undertaking of A;
- 28 (5) an undertaking in which A or an undertaking mentioned in head (1), (2), (3) or (4) supra has a participating interest;
- 29 (6) if A or an undertaking mentioned in head (1) or (4) supra is a building society, an associated undertaking of the society; or
- 30 (7) if A or an undertaking mentioned in head (1) or (4) supra is an incorporated friendly society, a body corporate of which the society has joint control (within the meaning of the Friendly Societies Act 1992 s 13(9)(c) or (cc) (as added)): Financial Services and Markets Act 2000 s 421(1).

'Participating interest' has the same meaning as in the Companies Act 1985 Pt VII (s 260), but also includes an interest held by an individual which would be a participating interest for the purposes of those provisions if he were taken to be an undertaking: Financial Services and Markets Act 2000 s 421(2). 'Associated undertaking' has the meaning given in the Building Societies Act 1986 s 119(1): Financial Services and Markets Act 2000 s 421(3).

8 Ibid s 43(3).

9 Ibid s 43(5). This provision does not affect the Authority's powers to vary a permission: s 43(6).

10 Ibid s 44(1). If, as a result of a variation of a permission there are no longer any regulated activities for which the authorised person concerned has permission, the Authority must, once it is satisfied that it is no longer necessary to keep the permission in force, cancel it: s 44(4). In varying a permission under s 44 the Authority may include any provision in the permission as varied that could be included if it were an application for a fresh permission: s 44(5). As to applications for permission see text and notes 1-9 supra.

11 Ibid s 44(2).

12 Ibid s 44(1)(a)-(c).

13 Ibid s 44(1)(d), (e).

14 Ibid s 44(3). 'Consumers' is not defined for the purpose of this provision. However, in relation to the Authority's statutory objective of the protection of consumers it means persons:

- 31 (1) who use, have used, or are or may be contemplating using, any of the services provided by authorised persons or their appointed representatives in carrying on regulated activities;
- 32 (2) who have rights or interests which are derived from, or are otherwise attributable to, the use of any such services by other persons; or
- 33 (3) who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them,

or who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons: s 5(3).

15 As to the conditions see PARA 32 text and notes 6-10 ante.

16 Financial Services and Markets Act 2000 s 45(1). As to the meaning of consumers see note 14 supra. The Authority may vary a permission in any of the ways mentioned in s 44(1) (see text and notes 12-13 supra): s 45(2). If, as a result of a variation of a permission, there are no longer any regulated activities for which the

authorised person concerned has permission, the Authority must, once it is satisfied that it is no longer necessary to keep the permission in force, cancel it: s 45(3). In varying a permission under s 45, the Authority may include any provision in the permission as varied that could be included if it were an application for a fresh permission: s 45(4). As to applications for permission see the text and notes 1-9 supra. The Authority may also take action on its own initiative at the request of, or for the purpose of assisting, a regulator who is outside the United Kingdom and of a prescribed kind: s 47(1); and see the Financial Services and Markets Act 2000 (Own-Initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639.

17 Financial Services and Markets Act 2000 s 53(1), (4). The notice must:

- 34 (1) give details of the variation and of when it takes effect;
- 35 (2) state the Authority's reasons for the variation and for its determination as to when the variation takes effect;
- 36 (3) inform the authorised person that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Financial Services and Markets Tribunal); and
- 37 (4) inform him of his right to refer the matter to the Tribunal: s 53(5).

The Authority may extend the period allowed under the notice for making representations: s 53(6). If, having considered any representations made by the authorised person, the Authority decides to vary the permission in the way proposed, or if the permission has been varied, not to rescind the variation, it must give him written notice which must inform the authorised person of his right to refer the matter to the Tribunal: s 53(7), (9), (11). If, having considered any representations made by the authorised person, the Authority decides (a) not to vary the permission in the way proposed, (b) to vary the permission in a different way, or (c) to rescind a variation which has effect, it must give him written notice which in the case of option (b) must comply with s 53(5): s 53(8), (10). As to the Financial Services and Markets Tribunal see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 43 et seq.

18 If the Authority proposes to cancel a person's permission it must give him a warning notice: *ibid* s 54(1). If the Authority decides to cancel a permission it must give him a decision notice: s 54(2). For the meanings of 'warning notice' and 'decision notice' see PARA 31 note 10 ante.

19 *Ibid* s 53(2). A variation may be expressed to take effect immediately, or on a specified date, only if the Authority, having regard to the ground on which it is exercising its power, reasonably considers that it is necessary for the variation to take effect immediately or on that date: s 53(3). A notice remains open to review if (1) the period during which any person may refer the matter to the Tribunal is still running; (2) the matter has been referred to the Tribunal but has not been dealt with; (3) the matter has been referred to the Tribunal and dealt with but the period during which an appeal may be brought against the Tribunal's decision is still running; or (4) such an appeal has been brought but has not been determined: ss 53(12), 391(8).

20 *Ibid* s 398(1). A person guilty of an offence under this section is liable, on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to a fine: s 398(3). For the meaning of 'statutory maximum' see PARA 22 note 5. If an offence committed by a body corporate is shown to have been committed with the consent or connivance of an officer, or to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 400(1).

UPDATE

35 Grant, variation and cancellation of permission

NOTE 4--Financial Services and Markets Act 2000 s 49(2) amended: SI 2007/1973.

TEXT AND NOTES 15, 16--2000 Act s 45(2A), (2B) added: SI 2007/126.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/36. Requirement of the utmost good faith.

2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE

(1) NON-DISCLOSURE AND MISREPRESENTATION

(i) In general

36. Requirement of the utmost good faith.

A contract of insurance is a contract based on the utmost good faith, and if the utmost good faith is not observed by either party the contract may be avoided by the other party¹. This principle is of universal application to all types of insurance contracts². The utmost good faith imposes positive obligations of disclosure³. In its practical application the principle permits either party to avoid the contract altogether if it is established against the other party either that: (1) there has been a failure by the other party to disclose a material fact; or (2) the other party has made an innocent misrepresentation of a material fact⁴, since statements made in a contract must be true in fact⁵.

Although an insurer's breach of the obligation to deal with the proposer with the utmost good faith does not give rise to a remedy in damages, the proposer is entitled to a return of the premium⁶.

¹ *Carter v Boehm* (1766) 3 Burr 1905 at 1909 per Lord Mansfield. This provision has been codified in relation to marine insurance: see the Marine Insurance Act 1906 s 17; and PARA 390 et seq post.

² *Lindenau v Desborough* (1828) 8 B & C 586 at 592; *London Assurance v Mansel* (1879) 11 ChD 363 at 367; *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 790, CA (revsd without affecting this point sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL); *Re Yager and Guardian Assurance Co* (1912) 108 LT 38 at 44; see also *Moens v Heyworth* (1842) 10 M & W 147 at 157; *Dalglisch v Jarvie* (1850) 2 Mac & G 231 at 243; *Brownlie v Campbell* (1850) 5 App Cas 925, HL; *Lee v British Law Insurance Co Ltd* [1972] 2 Lloyd's Rep 49, CA, per Karminski LJ; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947, HL.

³ See PARA 37 post.

⁴ *Thomson v Weems* (1884) 9 App Cas 671; *Macdonald v Law Insurance Co* (1874) LR 9 QB 328; *Duckett v Williams* (1834) 2 Cr & M 348. The insurers remedy is to avoid the contract, there is no right to damages: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 (affd [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230).

⁵ *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Fowkes v Manchester and London Life Assurance and Loan Association* (1863) 3 B & S 917; *Thomson v Weems* (1884) 9 App Cas 671.

⁶ *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249 at 280, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, HL, per Lord Templeman. The possibility of an insured having a claim in damages 'in an exceptional case' was recognised in: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250 at [70], [2001] 2 Lloyd's Rep 483 at [70], per Rix LJ (affd [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230).

UPDATE

36 Requirement of the utmost good faith

NOTE 4--See also *Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2004] EWCA Civ 622, [2005] Lloyd's Rep IR 423.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/37. Duty to make disclosure.

37. Duty to make disclosure.

The duty to disclose material facts in a contract of insurance is mutual, although the occasions for disclosure by the insurers are rare¹ since the facts material to the insurance are not, as a general rule, known to the insurers but only to the proposer for insurance². Particularly, it is the duty of the proposer during the preliminary negotiations to make full disclosure of all material facts known to the proposer³. This duty is a positive duty to disclose and a mere negative omission constitutes a breach. However, it is sufficient if the facts disclosed put the insurers on inquiry, and their inquiry would in the normal course elicit such further facts as may be material⁴.

The duty is a common law duty in the sense that its extent depends on the general common law principles of insurance; it is not merely a contractual duty arising from the terms of the particular contract in question⁵. In non-marine insurance it is usual to introduce into the contract special stipulations which may, expressly or by implication, define, regulate or even limit the amount of disclosure which would otherwise be necessary⁶. The introduction of such stipulations may, as a matter of interpretation of the contract, indicate a limitation of the field within which disclosure by the proposer is required, but unless it is clear from the terms of the contract that there has been a limitation of the field in this way, the full common law duty continues to be operative⁷.

Questions seeking information with respect to a person's previous convictions may not be treated as relating to spent convictions⁸. The person questioned must not be subjected to any liability or otherwise be prejudiced in law by reason of any failure to acknowledge or disclose such a conviction⁹.

The onus of proving that the insured has failed to perform the duty of disclosure or has broken a condition relating to disclosure lies on the insurers¹⁰.

1 *Carter v Boehm* (1766) 3 Burr 1905; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947, HL; *Norwich Union Life Insurance Society v Qureshi*; *Aldrich v Norwich Union Life Insurance Co Ltd* [1999] 2 All ER (Comm) 707, [2000] 1 Lloyd's Rep IR 1, CA. As to insurers' duties see PARA 50 post.

2 *London General Omnibus Co v Holloway* [1912] 2 KB 72 at 85, CA.

3 *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL; see also *Thomson v Weems* (1884) 9 App Cas 671, HL; *Re General Provincial Life Assurance Co Ltd, ex p Daintree* (1870) 18 WR 396; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 897, CA. As to material facts see PARAS 38-43 post; as to facts unknown to the proposer see PARA 44 post; as to the position in relation to marine insurance see PARA 393 et seq post.

4 *Carter v Boehm* (1766) 3 Burr 1905; *Lindenau v Desborough* (1828) 8 B & C 586; *Wheelton v Hardisty* (1858) 8 E & B 232 at 270 per Lord Campbell CJ; *Kreglinger and Fernau Ltd v Irish National Insurance Co Ltd* [1956] IR 116; *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421 (insurer not put on inquiry by describing goods as 'new').

5 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 886, CA; *Merchants and Manufacturers Insurance Co Ltd v Hunt and Thorne* [1941] 1 KB 295 at 313, [1941] 1 All ER 123 at 128-129, CA, per Scott LJ; *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep 169 at 176 per May J. Nevertheless, the duty is sometimes referred to as an implied term of the contract; see eg *Moens v Heyworth* (1842) 10 M & W 147 at 157 per Parke B.

6 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230; and see PARA 52 post.

7 See PARA 38 et seq post.

8 See the Rehabilitation of Offenders Act 1974 s 4(2)(a); the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975/1023 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 664 et seq.

9 See the Rehabilitation of Offenders Act 1974 s 4(2)(b); the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 664 et seq.

10 *Stebbing v Liverpool and London and Globe Insurance Co* [1917] 2 KB 433; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep 314, Vict CA (motor insurance).

UPDATE

37 Duty to make disclosure

NOTE 4--As to the duty to make disclosure when making a claim under a policy see *Marc Rich Agriculture Trading SA v Fortis Corporate Insurance NV* [2004] EWHC 2632 (Comm), [2005] Lloyd's Rep IR 396.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/38. Material facts.

38. Material facts.

The rules for determining what facts are material to be disclosed have been codified in relation to marine insurance¹. These rules are generally applicable to all contracts of insurance², apart from any special stipulations in the contract limiting the field of disclosure³. A fact is material if it would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk⁴. A fact may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent insurer's decision whether to accept the risk and if so at what premium. But, if the non-disclosure of a material fact did not in fact induce the making of the contract the insurer is not entitled to rely on it as a ground for avoiding the contract⁵.

The fact must be one affecting the risk⁶. If it has no bearing on the risk it need not be disclosed⁷, nor need it be disclosed if it diminishes the risk⁸. Whether a fact is material will depend on the circumstances, as proved in evidence, of the particular case⁹. It is for the court to rule as a matter of law whether a particular fact is capable of being material. Of particular relevance will be the nature of the risk¹⁰, insurance practice in relation to that risk¹¹ and the circumstances at the time when the disclosure ought to have been made¹². Rules of universal application are not therefore to be expected, but the propositions set out in the following paragraphs are well established¹³.

1 See the Marine Insurance Act 1906 s 18; and PARAS 390-407 post.

2 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL; *Becker v Marshall* (1922) 12 Ll L Rep 413 at 416, CA.

3 See PARAS 51-55 post.

4 Marine Insurance Act 1906 s 18(2). *Glicksman v Lancashire and General Assurance Co Ltd* [1927] AC 139 at 143, HL; *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 2 KB 53, [1942] 1 All ER 529, CA; *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515 at 529 per Roskill J; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep 314 at 325, Vict CA, per Pape J; *Lee v British Law Insurance Co Ltd* [1972] 2 Lloyd's Rep 49, CA; *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 at 463 per Kerr J; *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep 169.

5 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 at 550, [1994] 3 All ER 581 at 618, HL, per Lord Mustill; *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA; *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, [2000] Lloyd's Rep IR 471, CA; *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] Lloyd's Rep IR 131.

6 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

7 Thus, trifling details are irrelevant: see *Morrison v Muspratt* (1827) 4 Bing 60 at 63; *Perrins v Marine and General Travellers' Insurance Society* (1859) 2 E & E 317.

8 Marine Insurance Act 1906 s 18(3)(a); *Carter v Boehm* (1766) 3 Burr 1905.

9 *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51 at 70 per Hamilton J; and see PARA 41 post.

10 See PARAS 39, 40 post.

11 The court may take expert evidence to assist its decision; see for example *Roselodge Ltd v Castle* [1966] 2 Lloyd's Rep 105, CA; *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 22.

12 See PARA 42 post.

13 See PARA 39 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/39. Facts affecting the physical hazard.

39. Facts affecting the physical hazard.

Any fact is material which leads to the inference, in the circumstances of the particular case, that the subject matter of insurance is not an ordinary risk, but is more likely to be affected by the peril insured against. This is referred to as the 'physical hazard'. In the case of life insurance such facts as the proposer's age, occupation and medical history are material¹. It is material in fire insurance that at the time of insuring there has been a fire in adjoining premises which has just been extinguished and is likely to break out again², or that a large quantity of waste paper is stored in a building of the insured who had described himself as a dealer in paper board³. Similarly, in the case of car insurance, the date of manufacture may be material⁴, as would the structure of the garage in which the car is kept where the car is insured against fire⁵. Further, in a combined hotel, catering and leisure insurance in respect of a motel the fact that a discotheque was operated on the premises should have been disclosed⁶.

1 See PARAS 532-534 post.

2 *Bufe v Turner* (1815) 6 Taunt 338.

3 *A F Watkinson & Co v Hullelt* (1938) 61 Ll L Rep 145; as to fire insurance see PARA 591 et seq post.

4 *Santer v Poland* (1924) 19 Ll L Rep 29; as to the definition of risk in motor vehicle insurance see PARAS 712-716 post.

5 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

6 *Roberts v Plaisted* [1989] 2 Lloyd's Rep 341, CA.

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40. Facts affecting the moral hazard.

Any fact is material which leads to the inference that the particular proposer is a person, or one of a class of persons, whose proposal for insurance ought to be subjected to special consideration before it can be decided whether it should be accepted at all or accepted at the normal rate. This is usually referred to as the 'moral hazard'¹. It is material in relation to motor vehicle insurance to know that the proposer has had convictions for motoring offences recorded against him², and it is irrelevant to show that in other cases policies have been issued by the same insurers even with knowledge of such convictions³. The age of the person who is to drive may also be material⁴. It is material under a burglary policy⁵, a trader's combined insurance policy⁶, an all risks insurance policy⁷ or a fire policy⁸ that the insured has a criminal record⁹.

There is no general duty to disclose any and every sort of insurance claim which the proposer may have made during his lifetime, in the absence of express questions directed to eliciting that information¹⁰, but it is often material to know that, in relation to insurance comparable with that sought, there have been previous losses or claims¹¹. It is also material that in relation to any class of insurance the renewal of previous policies has been refused¹² or previous proposals have been declined¹³.

1 *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408, 54 Ll L Rep 211 at 414, CA, per Slessor LJ; *James v CGU Insurance plc* [2002] Lloyd's Rep IR 206; *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88.

2 *Zurich General Accident and Liability Insurance Co v Leven* 1940 SC 406; *Jester-Barnes v Licenses and General Insurance Co Ltd* (1934) 49 Ll L Rep 231; see, however, PARA 37 text and notes 8-9 ante.

3 *Merchants' and Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196, [1937] 2 All ER 767, CA.

4 *Merchants' and Manufacturers' Insurance Co Ltd v Hunt* [1940] 4 All ER 205; affd on other grounds [1941] 1 KB 295, [1941] 1 All ER 123, CA.

5 *Schoolman v Hall* [1951] 1 Lloyd's Rep 139, CA; *Regina Fur Co Ltd v Bossom* [1957] 2 Lloyd's Rep 466 (affd on another point [1958] 2 Lloyd's Rep 425, CA); *Roselodge Ltd (formerly Rose Diamond Products Ltd) v Castle* [1966] 2 Lloyd's Rep 105, CA. As to burglary insurance see PARAS 644-650 post.

6 *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep 169 at 176 per May J.

7 *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485, CA (insured's spouse had previous convictions for receiving stolen goods and theft). As to all risks insurance policies see PARAS 658-659 post.

8 *Woolcott v Excess Insurance Co Ltd and Miles, Smith, Anderson and Game Ltd (No 2)* [1979] 2 Lloyd's Rep 210 (where brokers knew of insured's criminal record, and failed to pass on information to the insurers); and see PARA 591 et seq post.

9 As to spent convictions see PARA 37 text to notes 8-9 ante.

10 *Ewer v National Employers' Mutual General Insurance Association Ltd* [1937] 2 All ER 193.

11 *Rozanes v Bowen* (1928) 32 Ll L Rep 98, CA; *Farra v Hetherington* (1931) 47 TLR 465; *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169; *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* [1976] 2 Lloyd's Rep 631, PC; *Insurance Corp of the Channel Islands, Royal Insurance (UK) Ltd v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151, CA; *New Hampshire Insurance Co v Oil Refineries Ltd* [2002] 2 Lloyd's Rep 462.

12 *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC; *Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty* [1975] 1 Lloyd's Rep 52, Aust SC.

13 *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA (affd [1927] AC 139, HL); *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408, CA; *Haase v Evans* (1934) 48 Ll L Rep 131.

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41. Materiality is a question of fact.

The materiality of a particular fact is determined by the circumstances of each case and is a question of fact¹. Materiality is not a question of belief or opinion tested subjectively², and the proposer does not discharge his duty by a full disclosure of what he believes to be material, however honest his belief; he must go further and disclose any fact which a reasonable man in his position would have thought material³. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk at all⁴. If a fact, although material, is one which the proposer did not and could not in the particular circumstances have been expected to know⁵, or if its materiality would not have been apparent to a reasonable man⁶, his failure to disclose it is not a breach of his duty. The proposer need not disclose matters already known to the insurer⁷, or matters as to which the insurer has waived information⁸. An insurer is deemed to know of matters of common knowledge⁹ and matters of which he ought to be aware as an insurer in that line of business¹⁰.

1 *Huguenin v Rayley* (1815) 6 Taunt 186; *Morrison v Muspratt* (1827) 4 Bing 60; *Lindenau v Desborough* (1828) 8 B & C 586; *Swete v Fairlie* (1833) 6 C & P 1; *Rawlins v Desborough* (1840) 2 Mood & R 328; *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 791, CA, per A L Smith LJ (revsd without affecting this point sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL).

2 *Morrison v Muspratt* (1827) 4 Bing 60; *Lindenau v Desborough* (1828) 8 B & C 586 at 592; *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Hoare v Bremridge* (1872) 8 Ch App 22, CA; *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515 at 529 per Roskill J.

3 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 883, CA; *Horne v Poland* [1922] 2 KB 364; *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515. The sole obligation on a person effecting insurance as a private individual is one of honesty and he is not required to enquire further into the facts so as to discharge his obligation to disclose all material facts known to him: *Economides v Commercial Union Assurance Co plc* [1998] QB 587 at 602, [1997] 3 All ER 636 at 648, CA, per Simon Brown LJ. The knowledge of an agent or employee may in some circumstances be imputed to the insured: *Regina Fur Co Ltd v Bossom* [1957] 2 Lloyd's Rep 466; affd on another point [1958] 2 Lloyd's Rep 425, CA (knowledge of company chairman of his own earlier conviction for receiving imputed to company). As to facts unknown to the proposer see further PARA 44 post. As to the position in marine insurance see PARA 395 post.

4 Marine Insurance Act 1906 s 18(2) (see PARA 390 et seq post); *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515 at 529 per Roskill J; *Zurich General Accident and Liability Insurance Co v Leven* 1940 SC 406 at 416; *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep 169 at 176 per May J; *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2003] All ER (D) 199 (Feb); and see PARA 38 ante.

5 *Swete v Fairlie* (1833) 6 C & P 1.

6 *Fowkes v Manchester and London Assurance Association* (1862) 3 F & F 440; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA.

7 *Carter v Boehm* (1766) 3 Burr 1905; *Lindenau v Desborough* (1828) 8 B & C 586; *Anglo-Californian Bank Ltd v London Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1.

8 *Anglo-African Merchants Ltd and Exmouth Clothing Co Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL; *Moore Large & Co Ltd v Hermes Credit Guarantee plc* [2003] EWHC 26 (Comm), [2003] 1 Lloyd's Rep 163, [2003] All ER (D) 116 (Jan) (where the insurer had affirmed the contract subsequent to non-disclosure); *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

9 *Noble v Kennoway* (1780) 2 Doug KB 510; *Stewart v Bell* (1821) 5 B & Ald 238; *Bates v Hewitt* (1867) LR 2 QB 595; *Glasgow Assurance Corpn Ltd v William Symondson Co* (1911) 16 Com Cas 109; *Leen v Hall* (1923) 16 Ll L Rep 100; *Hales v Reliance Fire and Accident Insurance Corpn Ltd* [1960] 2 Lloyd's Rep 391.

10 *Noble v Kennoway* (1780) 2 Doug KB 510; and see PARAS 393, 401 post.

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42. Time for determining materiality.

Full disclosure must be made of all relevant facts and matters which have occurred up to the time at which there is a concluded contract¹. The non-disclosure of a material fact existing prior to the conclusion of the contract will become a ground for avoiding the concluded contract². It follows from this principle that the materiality of a particular fact is determined by the circumstances existing at the time when it ought to have been disclosed, and not by the events which may subsequently transpire³. Equally, it is not a breach of the insurer's own duty of utmost good faith to rely upon the materiality of facts in avoiding a policy even though at the date of avoidance or at a subsequent trial those facts have proved not to be true⁴.

1 *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL; *Wake v Atty* (1812) 4 Taunt 493. As to the position with the renewal of a contract of insurance see PARAS 161-165 post.

2 For the duty of the insured to make full disclosure see PARA 37 ante; for the avoidance of the contract see PARA 49 post.

3 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL; *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184, 86 LJB 1068; *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88; *Brotherton v Aseguradora Colseguros SA* [2003] All ER (D) 371 (Feb); cf *Watson v Mainwaring* (1813) 4 Taunt 763; and PARA 397 post.

4 *Brotherton v Aseguradora Colseguros SA* [2003] All ER (D) 371 (Feb); *Drake Insurance plc v Provident Insurance plc* [2003] EWHC 109 (Comm), [2003] All ER (D) 02 (Feb), not following on this point *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88.

UPDATE

42 Time for determining materiality

NOTES 3, 4--*Brotherton*, cited, reported at [2003] EWHC 335 (Comm), [2003] 1 All ER (Comm) 774, affirmed: [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298.

NOTE 4--*Drake Insurance*, cited, reversed: [2003] EWCA Civ 1834, [2004] 2 WLR 530.

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43. Duty applies throughout negotiations.

The duty to make full disclosure continues to apply throughout the negotiations for the contract, but it comes to an end when the contract is concluded¹. A refusal by other insurers to renew an existing policy is material and must be disclosed². If any new material fact arises before acceptance of the proposal, or if an existing fact which was previously immaterial becomes material owing to a change of circumstances, it must be disclosed³. If, pending the acceptance of a proposal for life insurance, the proposer sustains a serious injury or contracts a serious disease, that fact too is material and must be disclosed⁴. Similarly, it may happen that a proposer for life assurance is advised by a specialist that he is in a dangerous state of health which is then for the first time diagnosed; the diagnosis must be disclosed to the insurers, even if the medical officer for the insurers has examined the proposer and passed him as fit⁵. However, material facts which come to the proposer's knowledge after the conclusion of the contract need not be disclosed. The proposer need not disclose the fact that, after acceptance of his proposal, another proposal made to other insurers has been declined⁶.

¹ As to the time of conclusion of the contract see PARAS 70-73 post; as to the continuation of the duty of good faith after conclusion of the contract see PARA 45 post.

² *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC; *Uzielli v Commercial Union Insurance Co* (1865) 12 LT 399 at 401 per Mellor J.

³ *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL; *Looker v Law Union and Rock Insurance Co* [1928] 1 KB 554; *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] All ER (Comm) 140, [2003] Lloyd's Rep IR 131; and see PARA 61 text and note 14 post.

⁴ *Canning v Farquhar* (1886) 16 QBD 727, CA; cf *Harrington v Pearl Life Assurance Co Ltd* (1914) 30 TLR 613, CA.

⁵ *British Equitable Insurance Co v Great Western Rly Co* (1869) 38 LJCh 314; *Harrington v Pearl Life Assurance Co Ltd* (1914) 30 TLR 613.

⁶ *Whitwell v Autocar Fire and Accident Insurance Co* (1927) 27 Ll L Rep 418.

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44. Facts unknown to proposer.

A proposer is under a duty to disclose to the insurer all material facts as they are within his knowledge¹. The proposer is presumed to know all the facts and circumstances concerning the proposed insurance. Whilst the proposer can only disclose what is known to him² the proposer's duty of disclosure is not confined to his actual knowledge, it also extends to those material facts which, in the ordinary course of business, he ought to know³. However, the insured is not under a duty to disclose facts which he did not know and which he could not reasonably be expected to know at the material time⁴. A person effecting insurance cover as a private individual must disclose only material facts known to him; he is not to have ascribed to him any form of deemed or constructive knowledge⁵. Equally, in the case of a commercial policy or a reinsurance, the applicant is not under any duty to undertake investigations unless there are to his knowledge circumstances which ought to have alerted him to the existence of possible material facts⁶.

Where the proposer uses an agent to effect the insurance, the agent must disclose to the insurer every material circumstance which is known to him. The agent is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him⁷. Failure by him to make disclosure will entitle the insurer to avoid the contract.

1 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 85, CA, per Kennedy LJ.

2 *Hearts of Oak Building Society v Law Union and Rock Insurance Co Ltd* [1936] 2 All ER 619 at 625 per Goddard J; see also *Wheulton v Hardisty* (1858) 8 E & B 232 at 269 per Lord Campbell CJ; *Australia and New Zealand Bank Ltd v Colonial and Eagle Wharves Ltd (Boag, third party)* [1960] 2 Lloyd's Rep 241 at 253-255 per McNair J.

3 *Proudfoot v Montefiore* (1867) LR 2 QB 511 at 519; *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531 at 537, 541, HL.

4 *Jones v Provincial Insurance Co* (1857) 3 CBNS 65; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 884, CA, per Fletcher Moulton LJ.

5 *Economides v Commercial Union Assurance Co plc* [1998] QB 587 at 601, [1997] 3 All ER 636 at 647, CA, per Simon Brown LJ.

6 Cf *Simner v The New India Assurance Co Ltd* [1995] LRLR 240.

7 Marine Insurance Act 1906 s 19(a); the provisions also apply to non-marine insurance: *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA, in which it was also confirmed that the agent must be one who deals with the insurer and makes the contract in question. An intermediate agent does not come within the section.

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45. Continuation of the duty of good faith after conclusion of the contract.

The principle of the utmost good faith has a continuing relevance to the parties' conduct after the contract has been made, at least in relation to a duty of disclosure¹. The extent of the duty depends on the particular circumstances but may arise in the cases of alterations of the risk², renewals³ and 'held covered' clauses⁴, when the insurer has a right to information under the policy although not in the making of claims⁵. However, there is a clear distinction to be made between the pre-contract duty of disclosure and any duty of disclosure which may exist after the contract is made. In the latter case an injured party will not be able to avoid the contract as a whole but must rely on his contractual remedies⁶.

1 *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 Lloyd's Rep 389.

2 See PARAS 123-128 post.

3 See PARAS 161-165 post.

4 Eg *Black King Shipping Corpn and Wayang (Panama) SA v Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437, but the reasoning of Hirst J in this case on the post contract duty of good faith can no longer be treated as sound law: *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1 at [71], [2001] 1 All ER 743 at [71], [2001] 1 Lloyd's Rep 389 at [71], per Lord Hobhouse.

5 *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563; *Agapitos v Agnew* [2002] EWCA Civ 247, [2003] QB 556, [2002] 1 All ER (Comm) 714: as to the making of claims see PARA 170 et seq post.

6 *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1 at [57], [2001] 1 Lloyd's Rep 389 at [57], [2001] 1 All ER 743 at [57], per Lord Hobhouse. It is only appropriate to invoke the remedy of avoidance in a post-contractual context in situations analogous to situations where the insurer has a right to terminate for a repudiation of the policy: *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275 at [35], [2001] 2 Lloyd's Rep 563 at [35], per Longmore LJ; as to the pre-contract position see PARA 49 post.

UPDATE

45 Continuation of the duty of good faith after conclusion of the contract

NOTE 1--See also *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 All ER (Comm) 501 (duty of good faith supported necessity to imply term as to disclosure in insurance contract).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/46. Representations of material facts.

46. Representations of material facts.

The second aspect of the duty of good faith arises in relation to representations made during the course of negotiations, and for this purpose all statements in relation to material facts made by the proposer during the course of negotiations for the contract¹ constitute representations and must be made in good faith². Just as all material facts within his knowledge must be fully disclosed, so also any statements made about such facts must be accurate in the sense that they do not mislead³. A representation may be inaccurate either because it is wholly false⁴ or because, although the facts actually stated are literally true, the statement is not complete and creates a misleading impression owing to the omission of other facts which ought to have been included⁵. Failure to disclose the full facts may thus render false those which are stated⁶. However, it is sufficient if the substance of the statement is accurate⁷; an unimportant misstatement which does not colour the whole picture⁸ or the omission of trifling details which would not affect an insurer's mind is irrelevant⁹. A misstatement does not matter if the true position is known to the insurers, as the misstatement can have no effect in causing the contract to be concluded¹⁰.

The obligation regarding representations applies equally to insurers¹¹. The onus of proving that there has been a misrepresentation lies on the party alleging it¹².

1 Statements made after the conclusion of the contract have no effect: *Roberts v Security Co* [1897] 1 QB 111, CA; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA; and cf *British Equitable Assurance Co Ltd v Baily* [1906] AC 35.

2 As to the requirement of utmost good faith see PARA 36 ante.

3 *Everett v Desborough* (1829) 5 Bing 503 at 518; *Wainwright v Bland* (1836) 1 M & W 32.

4 *Re Marshall and Scottish Employers' Liability and General Insurance Co Ltd* (1901) 85 LT 757; cf *Golding v Royal London Auxiliary Insurance Co* (1914) 30 TLR 350; see PARA 60 post.

5 *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 281, HL, per Lord Halsbury LC; *Peek v Gurney* (1873) LR 6 HL 377 at 400, HL, per Lord Colonsay; *R v Lord Kylsant* [1932] 1 KB 442 at 444-445 per Wright J; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

6 *Dimmock v Hallett* (1866) 2 Ch App 21 at 27-28 per Turner LJ; *Pulsford v Richards* (1853) 17 Beav 87 at 96 per Romilly MR; *R v Lord Kylsant* [1932] 1 KB 442 at 445 per Wright J; *London Assurance v Mansel* (1879) 11 ChD 363 (statement that negotiations were pending with other insurers omitted that some of the other insurers had already refused the proposal). See also *Cazenove v British Equitable Assurance Co* (1860) 29 LJCP 160, Ex Ch; *Re General Provincial Life Assurance Co Ltd, ex p Daintree* (1870) 18 WR 396.

7 *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917 at 924; *Yorke v Yorkshire Insurance Co* [1918] 1 KB 662; and see PARA 61 post.

8 *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485; *Dawsons Ltd v Bonnin* [1922] 2 AC 413 at 425, HL.

9 *Morrison v Muspratt* (1827) 4 Bing 60 at 63; *Perrins v Marine etc Insurance Society* (1859) 2 E & E 317.

10 *Smith v Kay* (1859) 7 HL Cas 750 at 779 per Lord Wensleydale; *Pulsford v Richards* (1853) 17 Beav 87 at 96 per Romilly MR; see also *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, where the true position was known to the insurer's agent. As to the question when an agent's knowledge is to be imputed to the principal see PARA 64 post.

11 See PARA 50 post.

12 *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep 314, Vict CA (motor insurance);
Stebbing v Liverpool and London and Globe Insurance Co Ltd [1917] 2 KB 433 (burglary insurance).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(i) In general/47. Honest misrepresentations.

47. Honest misrepresentations.

It is the rule in marine insurance that if any representation is made which is inaccurate in a material particular, although the misstatement is innocent and the truth of the representation has not been made a matter of contract, it may be a ground for avoiding the policy even after loss¹. This is generally accepted as being applicable in all classes of insurance². However, where the proposer qualifies his representation by expressly stating that it was made to the best of his belief and is effectively a statement of honest opinion held on reasonable grounds, the innocent misrepresentation does not give grounds for avoiding the contract³. In life insurance it is readily assumed that statements by a proposer as to his health are asked for and given on the basis of his belief, because the ordinary man cannot be expected to know what is happening to his internal organs, or what specific symptoms may indicate⁴, but the same tolerance is not afforded to a positive statement as to his habits being temperate⁵. Accordingly, in life insurance there are a number of dicta⁶ and one express decision⁷ to the effect that this branch of insurance is an exception to the general rule, in that fraud has to be established by insurers seeking to avoid a policy. However, it is common in this class of insurance to find inserted an express condition in the policy that the truth of any statement made in the proposal is either warranted by the proposer, is to be a condition precedent to the enforcement of the contract or is to be the basis on which the contract is made, in which case honesty of belief in the truth of the statement is not sufficient⁸. Further, where a misstatement involves a non-disclosure of a material fact, the contract may always be avoided on the latter ground⁹.

1 See the Marine Insurance Act 1906 s 20; and PARAS 408-410 post.

2 *Graham v Western Australian Insurance Co Ltd* (1931) 40 LI L Rep 64 at 66 per Roche J; see also *Golding v Royal Auxiliary Insurance Co Ltd* (1914) 30 TLR 350 at 351; *Merchants' and Manufacturers' Insurance Co v Hunt and Thorne* [1941] 1 KB 295 at 318, [1941] 1 All ER 123 at 136, CA; *Zurich General Accident and Liability Insurance Co v Leven* 1940 SC 406.

3 *MacDonald v Law Union Insurance Co* (1874) LR 9 QB 328; cf *Jones v Provincial Insurance Co* (1857) 3 CBNS 65 at 86 per Cresswell J; *Economides v Commercial Union Assurance Co plc* [1998] QB 587, [1997] 3 All ER 636, CA.

4 See eg *Life Association of Scotland v Forster* (1873) 11 Macph 351, Ct of Sess; *Delahaye v British Empire Mutual Life Assurance Co* (1897) 13 TLR 245, CA.

5 *Thomson v Weems* (1884) 9 App Cas 671, HL.

6 *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 504 per Lord Cranworth; *Wheelton v Hardisty* (1858) 8 E & B 232 at 299, Ex Ch, per Willes J; *Thomson v Weems* (1884) 9 App Cas 671 at 683-684, HL; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 877, CA, per Vaughan Williams LJ.

7 *Scottish Provident Institution v Boddam* (1893) 9 TLR 385.

8 See *Wheelton v Hardisty* (1858) 8 E & B 232, Ex Ch. See further PARA 62 post.

9 *Lindenau v Desborough* (1828) 8 B & C 586; *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 243; *British Equitable Insurance Co v Great Western Ry Co* (1869) 38 LJCh 314; *London Assurance v Mansel* (1879) 11 ChD 363; *British Equitable Insurance Co v Musgrave* (1887) 3 TLR 630; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA; *Horne v Poland* [1922] 2 KB 364; *Glicksman v Lancashire and General Assurance Co* [1925] 2 KB 593, CA (affd [1927] AC 139, HL); *West v National Motor and Accident Insurance Union Ltd* [1955] 1 All ER 800, [1955] 1 WLR 343, CA. As to the extent of the duty to disclose see PARA 37 ante.

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48. Truth at the date of the contract.

Representations are the statements made by the parties during the negotiations leading up to the conclusion of the contract, but they do not form any part of the contract¹. The duty to make accurate representations exists up to the conclusion of that contract, and if before then statements which have been made either become or are discovered to be untrue, they must be corrected². The principle is of particular importance in the case of statements of intention; these are only representations, and if honestly made, a change of intention after the contract is concluded does not affect the validity of the contract or the rights of the parties³. However, where the proposer changes his intention before the contract is concluded, it is his duty to correct his statement, and if he fails to do so the insurers may avoid the contract⁴. In the case of contracts for a fixed period such as a year, each renewal operates as a new contract⁵ and the insurers must therefore be brought up to date on each renewal with the true state of affairs as it then exists⁶.

1 *Roberts v Security Co* [1897] 1 QB 111 at 115, CA, per Lopes LJ.

2 *Canning v Farquhar* (1886) 16 QBD 727, CA; see PARA 43 ante.

3 *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744; *R v National Insurance Co* (1887) 13 VLR 914; *Grant v Aetna Insurance Co* (1862) 15 Moo PCC 516; cf *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550.

4 *Traill v Baring* (1864) 4 De GJ & Sm 318; *Re Marshall and Scottish Employers' Liability and General Insurance Co Ltd* (1901) 85 LT 757.

5 *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622; see PARA 165 post.

6 *Pim v Reid* (1843) 6 Man & G 1; *Re Wilson and Scottish Insurance Corp* [1920] 2 Ch 28. A representation made in negotiations for one contract is not, however, to be regarded as carried forward in this way into new negotiations for an entirely distinct contract: *Dawson v Atty* (1806) 7 East 367.

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49. Effect of non-disclosure or misrepresentation.

The effect of non-disclosure or misrepresentation, within the principles already discussed¹, is that the insurers have the right to treat the policy as avoided ab initio². This right does not depend on any implied term in the contract itself³, but is an inherent right derived as a matter of law from the nature of the contract. The remedy is regarded as akin to the equitable remedy of rescission which is available in the case of all contracts entered into as a result of misrepresentation⁴. The remedy is not available for non-disclosure of a fact of which the insured was unaware, although there is a right to avoid for a purely innocent misrepresentation on the part of the insured⁵. Furthermore, that remedy involves in all cases the principle that the parties must be put back so far as may be into the position which they occupied before the contract was made, in particular by restoring any consideration which has been paid⁶. However, where the insurers answer a claim by repudiating the policy on the ground of fraud, misrepresentation or non-disclosure, they are not bound to offer a return of premium⁷, and the court will not normally allow the proposer to set up his own fraud or misconduct in order to found a claim to such repayment⁸. Where the insurers apply to the court for relief in a case where all they can establish is a misrepresentation which is innocent and there is no clause in the policy to cover this position, the court may make it a condition of granting relief that any premiums paid are to be returned⁹. The insurers need only apply to the court for a decree where specific statutory provision has been made to that effect¹⁰, although it is always possible to seek an order for the delivery up of the policy for cancellation¹¹. The common law right is one which can only be exercised in relation to the whole contract¹². The insurers are not entitled to treat the contract as subsisting for some purposes but not for others; if they elect to repudiate the policy, there ceases for any purpose to be a contract between the parties¹³. It is an entirely different situation, governed by different principles, where insurers seek to repudiate, not the policy, but a claim under it¹⁴. Like any other, the right can be waived, and insurers may find that their conduct, after acquiring full knowledge of the relevant non-disclosure or misrepresentation, is regarded either as amounting to an affirmation of the contract, or as leading the insured to suppose that it is being affirmed and to act accordingly, so as to debar the insurers afterwards from exercising the right on that ground¹⁵. The principles governing such a waiver are the same as in relation to a breach of condition¹⁶.

A person who by any deception dishonestly obtains for himself, or another, any pecuniary advantage where he is allowed to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so commits an offence¹⁷. On conviction on indictment he will be liable to imprisonment for a term not exceeding five years¹⁸.

1 See PARA 36 et seq ante.

2 See *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197; *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 at 339, PC; *Newbury International Ltd v Reliance National Insurance Co (UK) Ltd* [1994] 1 Lloyd's Rep 83; and PARA 47 note 9 ante. Non-disclosure does not automatically vitiate the contract ab initio: *Mackender v Feldia AG* [1967] 2 QB 590, [1966] 3 All ER 847, CA. In the case of composite insurance non-disclosure or misrepresentation by one insured will not entitle the insurer to avoid the contract as against any other, innocent, insured: *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24, [1996] CLC 1728, CA.

3 *Merchants' and Manufacturers' Insurance Co Ltd v Hunt and Thorne* [1941] 1 KB 295 at 318, [1941] 1 All ER 123 at 136, CA; *Schoolman v Hall* [1951] 1 Lloyd's Rep 139, CA; *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep 169 at 175 per May J.

4 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 (affd [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230); *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88. For misrepresentation generally see *Redgrave v Hurd* (1881) 20 ChD 1, CA; the Misrepresentation Act 1967 ss 1-5 (as amended); and MISREPRESENTATION AND FRAUD.

5 *Kelly v Enderton* [1913] AC 191 at 194, PC; *McKeown v Bondard-Peveril Gear Co* (1896) 65 LJCh 446 (affd 65 LJCh 735, CA); *Coles v White City (Manchester) Greyhound Association Ltd* (1929) 45 TLR 230, CA. See further MISREPRESENTATION AND FRAUD.

6 *Newbigging v Adam* (1886) 34 ChD 582, CA (affd sub nom *Adam v Newbigging* (1888) 13 App Cas 308, HL); *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA. See further MISREPRESENTATION AND FRAUD.

7 *British Equitable Insurance Co v Musgrave* (1887) 3 TLR 630.

8 *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA; *Taylor v Chester* (1869) LR 4 QB 309; *Chapman v Fraser* (1793) Marshall on Marine Insurances, 4th Edn 525.

9 *Prince of Wales etc Association Co v Palmer* (1858) 25 Beav 605; *London Assurance Co v Mansel* (1879) 11 ChD 363 at 372 per Jessel MR; *Lodge v National Union Investment Co* [1907] 1 Ch 300; *Chapman v Michaelson* [1908] 2 Ch 612 at 620 per Eve J.

10 Eg by the Road Traffic Act 1988 ss 151, 152 (both as amended): see PARAS 748-749 post.

11 *Rivaz v Gerussi* (1880) 6 QBD 222, CA; *Brooking v Maudsley Son and Field* (1888) 38 ChD 636.

12 *West v National Motor and Accident Insurance Union* [1955] 1 All ER 800, [1955] 1 WLR 343, CA; *James v CGU Insurance plc* [2002] Lloyd's Rep IR 206.

13 As to the circumstances in which a party seeking to repudiate a contract can rely on an arbitration clause contained in the contract see *Woodall v Pearl Assurance Co Ltd* [1919] 1 KB 593; and PARA 186 post.

14 See *Woodall v Pearl Assurance Co Ltd* [1919] 1 KB 593 at 603, CA, per Bankes LJ; and PARA 187 post.

15 *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365; *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136.

16 See PARAS 112-113 post.

17 Theft Act 1968 s 16(2)(b). 'Deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person: ss 15(4), 16(3).

18 Ibid s 16(1).

UPDATE

49 Effect of non-disclosure or misrepresentation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--An insurer who seeks to avoid a policy on the ground of non-disclosure must prove that he has been induced by the non-disclosure to enter into the contract on the relevant terms: *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834, [2004] QB 601; *Mundi v Lincoln Assurance Ltd* [2005] EWHC 2678 (Ch), [2006] Lloyd's Rep IR 353.

NOTE 15--See *Drake Insurance plc v Provident Insurance plc*, NOTE 2.

TEXT AND NOTES 17, 18--Theft Act 1968 ss 15, 16 repealed: Fraud Act 2006 Sch 1 para 1(a), Sch 3. See now Fraud Act 2006; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 309A.

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50. Insurers' duties.

The duty of good faith is incumbent on insurers just as much as on the proposer¹, although the occasions for its being invoked against them are rare and the field within which it can be invoked is necessarily limited. However, examples occur where, in a prospectus or similar invitation to take out insurance, statements are made as to the nature or effect of an insurance; any such statement must be accurate². A misstatement on such a point will enable the proposer in an appropriate case to obtain rectification of the policy and so enforce a claim on the basis of the insurers' statements³, or will preclude the insurers from a defence to a claim which, but for the misstatement, would have been open to them⁴. When such a statement is fraudulent the proposer may elect to avoid the contract on that ground, and he can recover any premiums which have been paid⁵.

1 *Carter v Boehm* (1766) 3 Burr 1905 at 1909; *Duffell v Wilson* (1808) 1 Camp 401; *Pontifex v Bignold* (1841) 3 Man & G 63; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947, HL. As with the proposer the duty of disclosure relates only to material facts affecting the risk: *Norwich Union Life Insurance Society v Qureshi*; *Aldrich v Norwich Union Life Insurance Co Ltd* [1999] 2 All ER (Comm) 707, [2000] Lloyd's Rep IR 1, CA.

2 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 430, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 250, HL; *Gorham v British Telecommunications plc* [2000] 4 All ER 867, [2000] 1 WLR 2129, CA.

3 *Sun Life Assurance of Canada v Jervis* [1944] AC 111, [1944] 1 All ER 469, CA.

4 *Collett v Morrison* (1851) 9 Hare 162; *Wood v Dwarries* (1856) 11 Exch 493. Omitting from the policy something which has been promised is the same in effect as seeking to introduce a new term: see PARA 73 post.

5 *Mutual Reserve Life Insurance Co v Foster* (1904) 20 TLR 715, HL; *Cross v Mutual Reserve Life Insurance Co* (1904) 21 TLR 15; *Merino v Mutual Reserve Life Insurance Co* (1904) 21 TLR 167; and see PARA 138 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(ii) Contractual Provisions as to Non-disclosure and Misrepresentation/51. Duties laid down by the contract.

(ii) Contractual Provisions as to Non-disclosure and Misrepresentation

51. Duties laid down by the contract.

A contract of non-marine insurance may contain provisions dealing with or affecting the disclosure of information either in the policy itself or in documents which are incorporated. Such provisions may either put into words what would in any case be the duty of the insured at common law or may extend¹ or restrict the scope of his duty². In either case it will be a question of interpretation whether the contractual provision operates so as to supersede the common law obligations in the field which it purports to cover³. Where such a provision is contained in the contract the duty of disclosure is contractual⁴; and as the provision is part of the contract between the parties, it becomes a term of the contract that disclosure is to be made in accordance with the provision; failure to make such disclosure is therefore a breach of contract, making available to the insurers such remedy as may be stipulated⁵. For the purpose of ascertaining whether the proposer has committed a breach or not, reference must be made to the precise terms or effect of the contract⁶.

1 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; and see *Australian Widows' Fund Life Assurance Society v National Mutual Life Association of Australasia Ltd* [1914] AC 634, PC.

2 *Anstey v British Natural Premium Life Association Ltd* (1908) 99 LT 16; affd 99 LT 765, CA. Where the insured is relieved of his duty to disclose by a term of the contract this will not similarly relieve his agent of his own duty to disclose: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230. As to the duty of an agent to disclose see PARAS 69, 393 post.

3 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230. As to the interpretation of the terms see PARAS 52-53 post.

4 *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 496; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 886, CA; *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433 at 437.

5 *Anderson v Fitzgerald* (1853) 4 HL Cas 484. As to when conditions of this kind are inoperative against third parties who are subrogated by statute to the rights of the insured against his insurers see PARA 742 et seq post.

6 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL (policy contained two conditions, one of which was restricted to material misstatements).

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52. Express and implied terms as to disclosure.

Provisions affecting the disclosure of information may be either express or implied. Expressly it may be stipulated on the part of the proposer that all matters relative to a particular topic, such as the proposer's state of health, have been disclosed and that nothing has been withheld, the stipulation being expressed in the form of a warranty or a condition precedent or a term forming the basis of the contract¹. Similarly it may be stipulated on the part of the insurers to the effect that, apart from fraud or wilful misrepresentation, the policy is not to be avoided². Such a stipulation may arise by implication from the way in which specific information is sought. Where, by questions asked in a proposal (assuming this, with the relevant answers, to be incorporated in the ultimate contract), it is plainly indicated that certain matters are regarded by the insurers as material, the questions cannot be answered merely by the letter, however correct the answers may be so far as they extend; all information which a reasonable man would recognise as being information in which the insurers are interested must be given³. Conversely, where the form and substance of the questions asked are such as to indicate to the proposer that the insurers' interest is confined to certain matters, the proposer need not go outside the field which has been so indicated⁴.

¹ As to such express stipulations see PARA 62 post.

² *Wood v Dwaris* (1856) 11 Exch 493; *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365; *Anstey v British Natural Premium Life Association Ltd* (1908) 99 LT 16 (affd 99 LT 765, CA); *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

³ *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA (affd [1927] AC 139, HL) (proposal by partners for insurance against burglary; proposal form contained question asking whether any company had declined proposers' burglary insurance; question answered in negative: previous proposal by one partner when trading alone had been refused; non-disclosure of material fact); *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep 314 at 323, Vict CA, per Pape J.

⁴ *Schoolman v Hall* [1951] 1 Lloyd's Rep 139 at 143, CA, per Asquith LJ; *Cape plc v Iron Trades Employers Insurance Association Ltd* (21 April 1999, unreported); see further PARA 51 ante.

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53. Terms as to misrepresentation.

The rules relating to representation are the same as the rules relating to disclosure of information except that, in relation to disclosure of information any special provisions in the contract are likely to be interpreted as relaxations for the benefit of the proposer, whereas in relation to representations the prime object is likely to be the protection of the insurers¹. The most common express provision is therefore one which extends the duty of the proposer by making the validity of the contract depend upon the accuracy of all statements made by the proposer during the course of the negotiations². Where there is such a provision it is unnecessary to consider whether an inaccurate statement was made fraudulently³ or innocently⁴. If the truth of the statement has been warranted or made a condition precedent to the contract or the basis of the contract, the contract has been breached if it is in fact untrue and the stipulated consequences follow⁵. It is not necessary to consider, unless the provision is by its terms limited to material misstatements⁶, whether the untrue statement was of any materiality whatsoever: it may be as to something so trivial or remote that no insurer would really be influenced one way or another. However, the contract is breached if there is in fact a breach of the stipulation that it is true⁷. In substance such a stipulation is a contractual extension of the moral hazard principle⁸.

1 *Worsley v Wood* (1796) 6 Term Rep 710; *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL; *Lancashire Insurance Co v IRC* [1899] 1 QB 353.

2 Any such condition is strictly construed against the insurers: *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863; *Anstey v British Natural Premium Life Association Ltd* (1908) 99 LT 16 (affd 99 LT 765, CA). For a case relating to the exclusion of liability on the part of the insured see *HH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

3 *London Assurance v Mansel* (1879) 11 ChD 363; *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA; *Bancroft v Heath* (1901) 6 Com Cas 137, CA.

4 *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328; *Thomson v Weems* (1884) 9 App Cas 671, HL. However, there is no breach of warranty if the insured expressly qualifies his statement as being true to the best of his belief; *Jones v Provincial Insurance Co* (1857) 3 CBNS 65; *Macdonald v Law Union Insurance Co* supra at 331 per Lush J.

5 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255 at 259, HL; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Holmes v Scottish Legal Life Assurance Society* (1932) 48 TLR 306.

6 *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485.

7 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL, where one of the conditions was limited to material misstatements, but the other required even immaterial statements to be true.

8 As to the moral hazard see PARA 40 ante.

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54. Effect of fraud.

The foregoing rules¹ are subject to exception in the case of fraud. Whatever may be provided in the contract, either expressly or on the face of the contract by implication, if the court is satisfied that the proposer has been guilty of fraud, either in concealment or in misstatement which, as a reasonable man, he is presumed to appreciate as likely to influence the parties to the bargain in the risks they are undertaking, the insurers will not be bound by the bargain². A court will only interpret a contractual provision as excluding liability for fraud if there is express language covering fraud³.

¹ ie the rules described in PARAS 51-53 ante.

² *The Bedouin* [1894] P 1 at 12, CA, per Lord Esher MR; *Herring v Janson* (1895) 1 Com Cas 177 at 180 per Mathew J.

³ *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 (affd [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230).

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55. Remedies for breach of contractual terms.

If by the contract the observance of a stipulation as to disclosure of information or the accuracy of a representation is made the basis of the contract or a condition precedent to the validity of the contract, or the proposer has warranted that a representation is true¹, the insurers are entitled in the event of non-disclosure or the inaccuracy of the representation to repudiate all liability under the contract². The insurers' right is sometimes described as a right to avoid the contract, but the description is not strictly accurate, since they are not relying upon something extrinsic to the contract as rendering it voidable, but are claiming the benefit of one of the terms of the contract itself in order to escape liability³. If before discovering the non-disclosure or inaccuracy the insurers have paid a claim under the contract, it seems clear that they are entitled, on discovering the true position, to recover the payment as money had and received by the payee to their use⁴, subject to the defence of change of position⁵.

1 As to declarations of warranty see PARA 62 post; and as to conditions and collateral terms see PARA 93 post.

2 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Glicksman v Lancashire and General Assurance Co Ltd* [1927] AC 139, HL; *Hales v Reliance Fire and Accident Corp Ltd* [1960] 2 Lloyd's Rep 391.

3 *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433 at 437-438, DC. The distinction stated in the text may be important where the insurers, in addition to denying liability, are also seeking to enforce an arbitration clause in the contract: see *Stebbing v Liverpool and London and Globe Insurance Co Ltd* supra; *Woodall v Pearl Assurance Co Ltd* [1919] 1 KB 593, CA; *Golding v London and Edinburgh Insurance Co* (1932) 43 Ll L Rep 487, CA; *Stevens & Sons v Timber and General Mutual Accident Insurance Association Ltd* (1933) 102 LJB 337, CA; *Heyman v Darwins Ltd* [1942] AC 356 at 384, 398, [1942] 1 All ER 337 at 353, 360, HL; and see PARA 186 post.

4 For examples of the right to recovery, on the ground of mistake of fact, of a payment made under a conditional contract when the condition has not been fulfilled see RESTITUTION vol 40(1) (2007 Reissue) PARA 93. For the right to bring an action for breach of contract in case of failure of consideration see CONTRACT vol 9(1) (Reissue) PARA 992; see further RESTITUTION vol 40(1) (2007 Reissue) PARA 87 et seq. As to the recovery of money obtained by fraud see RESTITUTION vol 40(1) (2007 Reissue) PARAS 151-153. As to the right of the insured to recover premiums paid see *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL; and PARAS 136-145 post.

5 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818; as to the defence of change of position see RESTITUTION vol 40(1) (2007 Reissue) PARAS 166-169.

UPDATE

55 Remedies for breach of contractual terms

NOTE 3--*Super Chem Products Ltd v American Life and General Insurance Co Ltd* [2004] UKPC 2, [2004] 1 All ER (Comm) 713 (insurer may seek to escape liability on alternative grounds, the one being suspicion of fraud and the other breaches of policy conditions).

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(iii) The Proposal and its Effect

56. Nature of a proposal.

In practice it is universal in non-marine insurance, other than for certain commercial policies and reinsurance effected at Lloyd's¹, to require the proposer to fill in and sign a standard form of proposal. The proposer will generally be bound by his signature even if he has not read the form². However this may not be the case where the proposer suffers from some form of incapacity³. The standard form usually contains particulars of the insurance which is required, although this is often done by reference to the insurers' published leaflets as to the insurances which are on offer. It has been stated that such a statement of the particulars of the insurance should contain in clear and unambiguous language any particular events on the happening of which the insurers will escape liability⁴. The form is one prepared by the insurers, so that the contra proferentem rule applies⁵. If, therefore, the impression is created in the mind of a reasonable man that what is being asked is intended to be exhaustive, the insurer's rights in relation to non-disclosure and misrepresentation may be seriously affected⁶. In completing, signing and submitting the proposal form the proposer is providing the information on which the insurers act in deciding whether to accept the proposal at all, and if so, at what premium⁷. The actual form of the particulars given as to the insurance and of the questions which are asked is regulated in detail by the kind of insurance which is sought, but all proposal forms are framed on the same general lines, which are summarised in the following paragraphs⁸.

1 For Lloyd's practice in marine insurance see PARAS 269-270 post; as to reinsurance see PARAS 385, 766-779 post.

2 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

3 *Saunders v Anglia Building Society* [1971] AC 1004, CA; *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469, CA (lack of education and understanding); *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, 61 LJQB 792, CA (illiteracy).

4 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 430, 433, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 250, HL; *Hussain v Brown* [1996] 1 Lloyd's Rep 627, (1995) Times, 15 December, CA.

5 For this rule see PARA 87 post; and generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179.

6 See PARAS 52 ante, 58 post.

7 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

8 See PARAS 57-60 post.

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57. Proposer's status.

The first matter to which the ordinary form of proposal is directed is the status of the proposer. In the case of life and personal accident insurance this is so fundamental that a considerable amount of detail is usually covered¹. In all insurance, however, the essentials required are the name, address and occupation of the proposer. If the name given by the proposer is not his true name, the deliberate concealment may be an indication of fraud². Inaccurate information given inadvertently may be disregarded if substantially true and unambiguous³. Similarly the full disclosure of the true address may be material⁴. Some latitude is given as regards occupation⁵, but the risk may well differ according to differences in occupation. If, therefore, the proposer has several occupations in relation to which he wishes the insurance to be operative, he must state them all⁶, even though a failure to do this will be immaterial (contractual provisions apart) where the premiums would not be affected⁷. In some insurances the proposer's age will be important; for example, young persons may be less experienced or considered more careless⁸.

1 As to life insurance see PARA 525 et seq post; as to accident insurance para 567 et seq post.

2 *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 50 TLR 528, CA.

3 *Dawsons Ltd v Bonnin* [1922] 2 AC 413 at 425, HL (where the statements formed the basis of the contract and were incorporated into the policy).

4 *Huguenin v Rayley* (1815) 6 Taunt 186 (proposer in gaol); see also *Grogan v London and Manchester Industrial Assurance Co* (1885) 53 LT 761.

5 *Perrins v Marine Insurance etc Insurance Society* (1859) 2 E & E 317 (affd (1860) 2 E & E 324, Ex Ch); *Woodall v Pearl Assurance Co Ltd* [1919] 1 KB 593, CA.

6 *Biggar v Rock Life Assurance Co* [1902] 1 KB 516.

7 *Perrins v Marine etc Insurance Society* (1859) 2 E & E 317. For cases where knowledge of the different occupations was imputed to the insurers see *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136.

8 See eg para 743 note 4 post.

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58. Nature of the risk.

The second matter to which the ordinary form of proposal is directed is the nature of the risk to be covered and the circumstances affecting it. Particulars given under this head constitute what is called 'the description of the risk'¹. They define the precise nature and scope of the proposed insurance, so that particular care is required on the part of the proposer to give information as to any subsequent change in the circumstances, since this may amount to an alteration of the risk and so affect the right of recovery². The questions asked under this head are necessarily detailed and varied according to the nature of the risk for which insurance is sought. In addition, there is often a general question inquiring whether there are any other circumstances material to the risk, and this is of some importance. There is the possibility that the specific questions may be interpreted as indicating that the insurers are limiting the field of their inquiries, so that no information need be disclosed which is outside the scope of the questions, however material such information would otherwise be³. If it is made plain, however, that the information sought by the questions is not exhaustive, this serves to remind the proposer that, notwithstanding his answers to the specific questions, there still remains the common law duty to disclose all material facts⁴. Even then immaterial matters need not be disclosed⁵, but anything which a prudent underwriter would regard as material must be stated unless the form of the question indicates that the proposer is at liberty to exercise his own judgment as to this⁶.

1 *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL; see also *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA; *Roberts v Anglo-Saxon Insurance Association* (1927) 96 LJKB 590, CA; *Beauchamp v National Mutual Indemnity Insurance Co Ltd* [1937] 3 All ER 19; and PARA 120 note 4 post.

2 See PARAS 123-128 post.

3 See *Schoolman v Hall* [1951] 1 Lloyd's Rep 139 at 143, CA, per Asquith LJ. See also *National Protector Fire Insurance Co Ltd v Nivert* [1913] AC 507, PC; *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350. Cf *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 876-878, CA. See also PARA 38 et seq ante.

4 For the principle that the common law duty is unaffected by the asking of specific questions see *Schoolman v Hall* [1951] 1 Lloyd's Rep 139, CA; and see also *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 892, CA; *Yorke v Yorkshire Insurance Co Ltd* [1918] 1 KB 662 at 666; *Arthrude Press Ltd v Eagle, Star and British Dominions Insurance Co* (1924) 59 L Jo 529; *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA (affd [1927] AC 139 at 144, HL); *Bond v Commercial Assurance Co* (1930) 35 Com Cas 171, DC; *Holt's Motors Ltd v South East Lancashire Insurance Co Ltd* (1930) 35 Com Cas 281, CA; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep 314, Vict CA. As to the duty of disclosure see PARAS 37-44 ante; and as to the duties laid down by the contract see also PARA 51 ante.

5 *Shilling v Accidental Death Insurance Co* (1858) 1 F & F 116.

6 *Jones v Provincial Insurance Co* (1857) 3 CBNS 65 at 86.

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59. Proposer's risk experience.

The third matter to which the ordinary form of proposal is directed is the previous experience of the proposer. This is common to all forms of insurance except life insurance. In the usual form the question is directed to eliciting particulars, either generally or within a specified period, of all losses sustained by the proposer in consequence of the peril to be insured against and of all claims in respect of such losses made upon insurers¹.

¹ *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC. As to the scope of the peril to be insured against see PARAS 664-665 post.

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60. Proposer's insurance record.

The fourth matter as to which information is usually sought is the proposer's insurance record. This is, of course, specifically directed to the moral hazard¹ and to the possibility of obtaining the opinion of other insurers. The proposer is accordingly asked to state whether other insurers have in the past declined proposals from him² or have cancelled or refused to renew insurances which he has held³, whether he is at the time of the proposal already insured elsewhere⁴ or is proposing to take out elsewhere any other insurance⁵. The questions are not always limited to the class of insurance proposed and may indeed be directed generally to all kinds of insurance, but unless it is expressly stated otherwise, questions of this nature will usually be construed as limited to the particular subject matter of the insurance sought. Thus, in a proposal for the insurance of business premises against fire, the proposer need not deal with his private record⁶.

1 As to the moral hazard see PARA 40 ante.

2 *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; *Re General Provincial Life Assurance Co Ltd, ex p Daintree* (1870) 18 WR 396; *London Assurance v Mansel* (1879) 11 ChD 363; *Scottish Provident Institution v Boddam* (1893) 9 TLR 385; *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1.

3 *Biggar v Rock Life v Assurance Co* [1902] 1 KB 516; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC; *Holt's Motors v South East Lancashire Insurance Co* (1930) 35 Com Cas 281, CA; *Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* [1975] 1 Lloyd's Rep 52, NSW SC.

4 *Wainwright v Bland* (1836) 1 M & W 32; *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96, PC; *Marcovitch v Liverpool Victoria Friendly Society* (1912) 28 TLR 188, CA; *National Protector Fire Insurance Co v Nivert* [1913] AC 507, PC.

5 *Re Marshall and Scottish Employers' Liability and General Insurance Co Ltd* (1901) 85 LT 757.

6 *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350.

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61. Rules applicable to proposal.

The basic rules to be observed in making a proposal for insurance may be summarised as follows.

- 41 (1) A fair and reasonable construction must be put upon the language of the question which is asked, and the answer given will be similarly construed¹. This involves close attention to the language used in either case, as the question may be so framed that an unqualified answer amounts to an assertion by the proposer that he has knowledge of the facts and that the knowledge is being imparted². However, provided these canons are observed, accuracy in all matters of substance will suffice and misstatements or omissions in trifling and insubstantial respects will be ignored³.
- 42 (2) Carelessness is no excuse, unless the error is so obvious that no one could be regarded as misled. If the proposer puts 'no' when he means 'yes' it will not avail him to say it was a slip of the pen; the answer is plainly the reverse of the truth⁴.
- 43 (3) An answer which is literally accurate, so far as it extends, will not suffice if it is misleading by reason of what is not stated⁵. It may be quite accurate for the proposer to state that he has made a claim previously on an insurance company, but the answer is untrue if in fact he has made more than one⁶.
- 44 (4) Where the space for an answer is left blank, leaving the question unanswered, the reasonable inference may be that there is nothing to enter as an answer⁷. If in fact there is something to enter as an answer, the insurers are misled in that their reasonable inference is belied. It will then be a matter of construction whether this is a mere non-disclosure, the proposer having made no positive statement at all⁸, or whether in substance he is to be regarded as having asserted that there is in fact nothing to state⁹.
- 45 (5) Where an answer is unsatisfactory as being on the face of it incomplete or inconsistent¹⁰ the insurers may, as reasonable men, be regarded as put on inquiry, so that if they issue a policy without any further inquiry they are assumed to have waived any further information¹¹. However, having regard to the inference mentioned in head (4) above, the mere leaving of a blank space will not normally be regarded as sufficient to put the insurers on inquiry¹².
- 46 (6) A proposer may find it convenient to bracket together two or more questions and give a composite answer. There is no objection to his doing so, provided the insurers are given adequate and accurate information on all points covered by the questions¹³.
- 47 (7) Any answer given, however accurate and honest at the time it was written down, must be corrected if, up to the time of acceptance of the proposal, any event or circumstance supervenes to make it inaccurate or misleading¹⁴.

1 *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; *Revell v London General Insurance Co Ltd* (1934) 50 Ll L Rep 114; *Johns v Kelly* [1986] 1 Lloyd's Rep 468 (professional indemnity insurance); cf *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC; *Hussain v Brown* [1996] 1 Lloyd's Rep 627, (1995) Times, 15 December, CA.

2 *Merchants' and Manufacturers' Insurance Co v Hunt and Thorne* [1941] 1 KB 295 at 311, [1941] 1 All ER 123 at 128, CA, per Scott LJ; *Zurich General Accident and Liability Insurance Co v Leven* 1940 SC 406 (proposal for motor insurance; if proposal form contains a question whether any person, who to the proposer's knowledge

will drive the car, has been convicted of a motoring offence, and the proposer answers 'no', the proposer is asserting that he has knowledge which he is professing to impart of the intended driver's record and that it is clear of convictions).

3 *Huguenin v Rayley* (1815) 6 Taunt 186; see further PARA 46 ante. However, there may be a condition requiring accuracy even in immaterial particulars: see PARA 53 ante.

4 *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess.

5 *Re General Provincial Life Assurance Co Ltd, ex p Daintree* (1870) 18 WR 396; *London Assurance v Mansel* (1879) 11 ChD 363; *New Hampshire Insurance Co v Oil Refineries Ltd* [2002] 2 Lloyd's Rep 462.

6 *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; see PARA 46 ante.

7 *Roberts v Avon Insurance Co Ltd* [1956] 2 Lloyd's Rep 240.

8 *London Assurance v Mansel* (1879) 11 ChD 363 at 369, explaining *Lindenau v Desborough* (1828) 8 B & C 586. The question whether the insured is guilty of misrepresentation or non-disclosure may be important in view of the wording of the particular condition: see *Marcovitch v Liverpool Victoria Friendly Society* (1912) 28 TLR 188, CA; cf *Perrins v Marine etc Insurance Society* (1859) 2 E & E 317 at 323.

9 *Roberts v Avon Insurance Co Ltd* [1956] 2 Lloyd's Rep 240.

10 *Keeling v Pearl Assurance Co Ltd* (1923) 129 LT 573.

11 *Thomson v Weems* (1884) 9 App Cas 671 at 694, HL; see also *Roberts v Avon Insurance Co Ltd* [1956] 2 Lloyd's Rep 240 at 249.

12 *Forbes & Co v Edinburgh Life Assurance Co* (1832) 10 Sh 451, Ct of Sess.

13 *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48.

14 *Canning v Farquhar* (1886) 16 QBD 727, CA; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38; *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350; and see PARA 43 ante.

UPDATE

61 Rules applicable to proposal

NOTE 1--See also *O'Connor v Bullimore Underwriting Agency Ltd* (2004) Times, 10 March, OH.

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62. Declaration warranting the proposal.

The proposal form concludes with a declaration, which is often required to be separately signed by the proposer so as to draw his particular attention to the importance of what he is signing, by which he warrants that the statements contained in the proposal are true, or agrees that they are to be the basis of the contract between the parties, or accepts that their truth is to be a condition precedent to the validity of the contract. All three variations of the same term may be included, and an additional clause may be inserted to the effect that no material information has been withheld¹. The purpose of the formulae is usually to incorporate the proposal into the eventual policy. If it is incorporated the proposal becomes a contractual document by reference to which the insurers' rights to repudiate are governed². If there is no incorporation the proposal provides a record, for the purpose of applying the common law rules, for establishing facts expressed and, by inference, facts withheld from the insurers³.

1 *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1.

2 *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Thomson v Weems* (1884) 9 App Cas 671, HL; *Australian Widows' Fund Life Assurance Society v National Mutual Life Association of Australasia Ltd* [1914] AC 634, PC; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, PC; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA (affd [1927] AC 139, HL); *Hussain v Brown* [1996] 1 Lloyd's Rep 627, (1995) Times, 15 December, CA.

3 See PARA 36 et seq ante.

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(iv) Imputation of Agent's Knowledge to Insurers

63. Knowledge of the agent.

The general principles of the law of agency are of particular relevance in insurance law, and govern the imputation of the agent's knowledge to the insurers¹. Before any question of imputed knowledge can arise it is necessary to establish the capacity of the parties as agent and principal². Where there are material facts disclosed to the agent the question arises how far that knowledge can be imputed to the insurer. The duty of the agent to inform the insurer of material facts as they arise exists throughout the duration of the contract³. Insurers may be bound by disclosures or information received by their agents but which nevertheless remain unknown to themselves⁴. However, the insurers may protect themselves by adding into the policy a condition requiring the insured to make disclosures or information known to the insurers themselves and that notice to the agent will not suffice⁵ until actual communication is made to them⁶.

1 See generally AGENCY vol 1 (2008) PARA 137.

2 *Bancroft v Heath* (1901) 6 Com Cas 137, CA; *Letts v Excess Insurance Co* (1916) 32 TLR 361 at 362 per Bailhache J; *O'Keefe v London and Edinburgh Insurance Co Ltd* [1928] NI 85, CA; *Wilkinson v General Accident Fire and Life Assurance Corp Ltd* [1967] 2 Lloyd's Rep 182.

3 *Marsden v City and County Assurance* (1865) LR 1 CP 232.

4 *Wing v Harvey* (1854) 5 De GM & G 265, distinguished by *Busteed v West of England Fire and Life Insurance Co* (1857) 5 I Ch R 553; *Gale v Lewis* (1846) 9 QB 730; *Marsden v City and County Assurance* (1866) LR 1 CP 232; *Re Solvency Mutual Guarantee Society, Hawthorne's Case* (1862) 31 LJCh 625; *Re Hennessy* (1842) IR 5 Eq 259; *Smith v Excelsior Life Assurance Co* (1912) 22 OWR 863; *Fowler v Scottish Equitable Life Insurance Society and Ritchie* (1858) 28 LJCh 225; cf *General Accident, Fire and Life Assurance Co v Robertson* [1909] AC 404 at 411, HL, per Lord Loreburn LC.

5 *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 19 TLR 82.

6 *Shiells v Scottish Assurance Corp Ltd* (1889) 16 R 1014, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(1) NON-DISCLOSURE AND MISREPRESENTATION/(iv) Imputation of Agent's Knowledge to Insurers/64. Imputation to principal of agent's knowledge.

64. Imputation to principal of agent's knowledge.

Third parties dealing with the insurers' agent are entitled to assume that it is his duty in that capacity either to place at the insurers' disposal knowledge of certain matters which he in fact has, however it may have been acquired¹, or to acquire on their behalf knowledge of certain matters². If the agent has actual knowledge of relevant matters, it will normally be imputed to the insurers without any question³. Even if the knowledge has come to the agent while acting in a distinct capacity⁴, it will be imputed to the insurers if it would be a breach of the agent's duty, as an agent, to withhold it⁵. If the truth as to relevant matters ought to have been ascertained by the agent from his own inquiries in the performance of his duty, the insurers are precluded from setting up their own agent's misconduct in failing to make the necessary inquiries; they will be treated as knowing what they would have known if their agent had performed his duty⁶. In fire insurance it is often the duty of the agent to describe the premises proposed after personal inspection, and if he describes them inaccurately the insurers are treated as knowing the true position⁷.

1 *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1; *O'Keefe v London and Edinburgh Insurance Co* [1928] NI 85, CA; *Woolcott v Excess Insurance Co Ltd and Miles, Smith, Anderson and Game Ltd (No 2)* [1979] 2 Lloyd's Rep 210.

2 *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136, as explained in *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

3 *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531.

4 *Tate v Hyslop* (1885) 15 QBD 368, CA; cf *Re Hennessey* (1842) IR 5 Eq 259 (agent, whose knowledge of an assignment of the policy was sought to be imputed to the insurer, was himself the assignor).

5 *Bradley v Riches* (1878) 9 ChD 189.

6 *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA, as explained in *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

7 *Pimm v Lewis* (1862) 2 F & F 778; *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485; *Blanchette v CIS Ltd* [1973] 5 WWR 547, Can SC.

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65. Scope of agent's authority.

The insurers' agent is their representative for the purposes of the negotiations and is thus the proper person to whom any disclosure, otherwise than on the face of the proposal, should or may be made¹. Therefore, if full and accurate disclosure is made orally by the proposer to the agent, the duty of disclosure is discharged² and the insurers cannot subsequently repudiate the policy on the ground that they were not informed personally; they cannot set up against the proposer their agent's failure to transmit the information as fully and accurately as he received it³. The same principle applies where a correction of an inaccurate statement in a proposal is subsequently communicated to the agent⁴. Further, the agent being the only person with whom the proposer can negotiate, he is inevitably the person to whom the proposer turns for advice either as to the meaning of questions in a proposal form which is about to be completed⁵, or as to the sufficiency of answers already given or proposed to be given to such questions⁶, and he acts as agent on behalf of the insurers in giving advice on these topics if it is sought; accordingly, when such advice has been given the insurers cannot subsequently repudiate the policy on the ground that the answers given are inadequate⁷. The onus is on the insured to prove that he made sufficient disclosure and that any inaccuracy or misstatement made was not his responsibility at all, but that of the agent⁸. However, the position is different where there is an express warranty as to the accuracy of a particular statement; in such a case the insurers are not precluded from relying on an inaccuracy by the fact that their agent was satisfied⁹. The position is also different where the answers in a proposal form are in fact entered by the agent¹⁰.

1 *St Margaret's Trust Ltd v Navigators and General Insurance Co Ltd* (1949) 82 Ll L Rep 752.

2 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA.

3 *Parsons v Bignold* (1846) 15 LJCh 379, as explained in *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485; *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136; cf *Kaufman v British Surety Insurance Co Ltd* (1929) 45 TLR 399.

4 *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350; *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136.

5 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA.

6 *Cruikshank v Northern Accident Insurance Co Ltd* (1895) 23 R 147, Ct of Sess; cf *Hough v Guardian Fire and Life Assurance Co Ltd* (1902) 18 TLR 273; *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521.

7 See the cases cited in notes 5-6 supra.

8 *Parsons v Bignold* (1846) 15 LJCh 379.

9 *Westropp v Bruce* (1826) Batt 155.

10 See PARA 68 post.

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66. Agent's fraud.

If an agent takes part in a fraud on the insurers whether by concealing or misrepresenting a material fact in concert with the proposer or by conniving at such a concealment or misrepresentation on the part of the proposer, the agent is not regarded as acting as agent of the insurers and his knowledge of the truth is not imputed to them¹. However a third party dealing in good faith with the insurer's agent, who acts within the apparent scope of his authority, is not prejudiced by the fact that the agent is acting fraudulently².

1 *Biggar v Rock Life Assurance Co* [1902] 1 KB 516, approved in *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at 375, CA, per Scrutton LJ; see also *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess; *Dunn v Ocean Accident and Guarantee Corp'n Ltd* (1933) 50 TLR 32, 47 Ll L Rep 129, CA.

2 *Hambro v Burnand* [1904] 2 KB 10, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Lloyd's Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 56, CA, per Scrutton LJ; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA.

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67. Contractual terms as to agent's authority.

The rules governing the imputation of the agent's knowledge¹ apply where there is no express contractual provision to the contrary. In practice, insurers may insert in their policies a condition excluding or modifying the application of the doctrine of imputed knowledge². Where there is such a condition, knowledge on the part of or disclosure to the agent, however full, does not avail the proposer³ unless the agent has actually transmitted to the insurers what is known or has been disclosed to him in such a manner as to comply with the condition⁴.

1 Ie those stated in PARAS 64-66 ante.

2 *Kelly v London and Staffordshire Fire Insurance Co* (1883) Cab & El 47; *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC. A common example of such a condition is one providing that the insurers are not to be affected by any knowledge on the part of, or any notice to, their agent in relation to any matter unless that matter has been communicated to the insurers and acknowledged by them in writing: see eg *M'Millan v Accident Insurance Co* 1907 SC 484.

3 *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC; *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *M'Millan v Accident Insurance Co* 1907 SC 484.

4 *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136.

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68. Agent acting outside scope of authority.

The principles relating to the imputation of the agent's knowledge¹ derive from the agent's authority to act as the insurers' agent; they have no place where the agent is not purporting to act as their agent or acts outside the scope of his authority². Except in the case of industrial assurance³, it now appears to be settled that an agent will not generally be regarded as having authority from the insurers to write answers into a proposal form⁴.

Except in the case of industrial assurance, in filling in the answers in a proposal form an insurance agent is regarded as the agent for the proposer at the proposer's request, express or implied⁵. Even if the agent knows the truth, his knowledge is not in that case imputed to the insurers⁶. If he is careless in filling up the form it is the proposer, not the insurers, who may maintain an action in negligence against him⁷. Further, where the proposer himself signs the proposal form, as is usually insisted upon by insurers, by signing he adopts whatever answers the agent has inserted and makes them his own⁸. This is clearly the case where he reads and approves the answers before signing, but the position is the same if he chooses to sign the proposal without reading them⁹ or if he signs the form when it is blank, leaving it to the agent to insert the answers later¹⁰. It is irrelevant to inquire how the inaccuracy arose, whether the agent acted honestly¹¹ or dishonestly¹², whether the agent had forgotten or misunderstood the correct information he had been given¹³ or whether the answers were a mere invention on the part of the agent¹⁴. If the result is that inaccurate or inadequate information is given on material matters or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer¹⁵.

1 Ie those stated in PARAS 64-66 ante.

2 For the position of a principal whose agent acts outside the scope of his authority see generally AGENCY vol 1 (2008) PARA 124.

3 It has been held in cases before the Industrial Assurance Commissioner that in industrial assurance an agent has authority from his company or society to fill in the proposal form: see eg *Long v Scottish Legal Life Assurance Society* (1926) Report of Industrial Assurance Commissioner 60; *Richmond v Royal Liver Friendly Society* (1933) Report of Industrial Assurance Commissioner 41; *White v Britannic Assurance Co Ltd* (1954) Report of Industrial Assurance Commissioner 2, following *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA, and distinguishing *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA. For statutory provisions as to proposals filled in by agents and as to warranties or non-disclosure in the case of industrial assurance see INDUSTRIAL ASSURANCE vol 24 (Reissue) PARA 239.

4 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *Facer v Vehicle and General Insurance Co Ltd* [1965] 1 Lloyd's Rep 113; *Dunn v Ocean Accident and Guarantee Corp Ltd* (1933) 50 TLR 32, CA; see also *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC; *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess; *M'Millan v Accident Insurance Co* 1907 SC 484; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1. There has been a conflict of judicial opinion on the point, but it appears that, in so far as it conflicts with the foregoing cases, the decision in *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA (with which *Brewster v National Life Insurance Society* (1892) 8 TLR 648, CA; *Thornton-Smith v Motor Union Insurance Co Ltd* (1913) 30 TLR 139; *Keeling v Pearl Assurance Co Ltd* (1923) 129 LT 573, are in accord) must be taken to apply, if at all, in special circumstances only. For criticism and explanation of that decision see *Newsholme Bros v Road Transport and General Insurance Co Ltd* supra at 368-369, 375, 381-382; and cf *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469, CA (insurers held not to be entitled to avoid policy where proposal containing incorrect answers had been signed by insured's wife after being filled in by insurers' agent without asking her any questions).

5 *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess; *Taylor v Yorkshire Insurance Co* (1913) 2 IR 1; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *Dunn v Ocean Accident and Guarantee Corp'n Ltd* (1933) 50 TLR 32, CA; cf *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469 at 475, CA, per Megaw LJ.

6 See the cases cited in note 4 supra. If all that the agent does is to take down what he is told by the proposer without being aware of any inaccuracy in what he is told to write, there cannot in any case be any question of imputing to the insurers knowledge which even the agent has not got: see *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at 376, CA, per Scrutton LJ; see also *Davies v National Fire and Marine Insurance Co of New Zealand* [1891] AC 485, PC.

7 *Connors v London and Provincial Assurance Co* (1913) 6 BWCC 146.

8 *Rokkyer v Australian Alliance Assurance Co* (1908) 28 NZLR 305; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *O'Connor v B D B Kirby & Co* [1972] 1 QB 90, [1971] 2 All ER 1415, CA.

9 The presumption is that he has read them: *New York Life Insurance Co v Fletcher* (1885) 117 US 519, approved in *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1; and in *Facer v Vehicle and General Insurance Co Ltd* [1965] 1 Lloyd's Rep 113.

10 *Parsons v Bignold* (1846) 15 LJCh 379; *Billington v Provincial Insurance Co* (1879) 3 SCR 182.

11 *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess.

12 *Biggar v Rock Life Assurance Co* [1902] 1 KB 516.

13 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *M'Millan v Accident Insurance Co* 1907 SC 484.

14 *Biggar v Rock Life Assurance Co* [1902] 1 KB 516, approved in *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

15 See the cases cited in note 4 supra.

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69. Insurance brokers and insurance agents.

If a person wishing to obtain non-marine insurance employs an insurance broker¹, as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the proposer for the acts and omissions of the broker. A broker must act in the best interests of his principal, exercise reasonable skill and care and act with reasonable speed².

If negotiations for such insurance are conducted on behalf of the insurers by an insurance agent, the insurers' responsibility for the agent's acts and omissions is similarly governed by the general law of agency³.

1 As to the position of an insurance broker in relation to marine insurance see PARA 283 post.

2 As to the specific obligations of a broker see PARA 284 post; and AGENCY vol 1 (2008) PARA 12.

3 See *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; and AGENCY. A broker who places insurance business under a cover agreement is simply the insurers' agent. His valuable connections are not his business to take elsewhere when he wishes: *Julien Praet et Cie SA v H G Poland Ltd* [1962] 1 Lloyd's Rep 566. For related proceedings see [1961] 1 Lloyd's Rep 187, CA; and PARA 74 note 2 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(2) FORMATION OF A CONTRACT TO INSURE/70. Necessity for offer and acceptance.

(2) FORMATION OF A CONTRACT TO INSURE

70. Necessity for offer and acceptance.

A contract of insurance, like any other contract, is created where there has been an unqualified acceptance by one party of an offer made by the other¹. So long as the matter is still under negotiation there is no contract², although it is open to the parties, pending conclusion of the negotiations, to enter into an interim contract of a limited nature, such as the issue of a cover note³. An offer may be made by the insurers, as in the case of insurance by coupon, acceptance being by the insured when he purchases the coupon or the article to which it is attached⁴. Normally literature or advertising material circulated or displayed by insurers does not constitute an offer but is only an invitation to treat⁵, and the formal offer comes into existence when a proposal form is completed and submitted to the insurers by the proposer⁶. In such cases there is little, if any, actual haggling as to the bargain; the proposer may wish to have specific additions to or deletions from the insurers' standard form of policy to suit his special needs or circumstances but, in general, the form sets out the only terms upon which the insurers are prepared to contract⁷. The proposer, by completing, signing and submitting the form, commits himself to those terms and undertakes to pay whatever the insurers may charge by way of premium⁸. When considering the proposal in such a case, where the insurers wish to make variations in their usual form of policy, whether by way of addition or subtraction, they must submit the variations to the proposer in the form of a counter offer⁹ before they have committed themselves to an unequivocal acceptance of the proposal¹⁰. If the contract is created otherwise than by acceptance of a written proposal it must be shown that there has been agreement on the fundamentals of the insurance proposed, namely the subject matter of the insurance, the amount of the insurance unless this is unlimited, the nature of the risks insured against, the period for which the insurance is to last¹¹ and the rate of premium to be charged¹², although the exact amount may have to be calculated¹³.

1 *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132 (reinsurance); and see generally CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

2 *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL; *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, CA; *Syndicate 1242 at Lloyd's v Morgan Read & Sharman Ltd* [2001] EWHC 499 (Comm); cf *Murfitt v Royal Insurance Co Ltd* (1922) 38 TLR 334 at 336.

3 *General Accident, Fire and Life Assurance Corp v Robertson* [1909] AC 404, HL. As to cover notes see PARA 75 post.

4 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA. By the terms of the coupon, the fulfilment of some condition, such as notification of acceptance or 'registration', may be necessary: *General Accident, Fire and Life Assurance Corp v Robertson* [1909] AC 404, HL. As to accident insurance by coupon see PARAS 587-588 post.

5 See further PARA 78 post; and CONTRACT vol 9(1) (Reissue) PARA 639.

6 *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291 at 293 per Lord Romilly; *General Accident Insurance Corp v Cronk* (1901) 17 TLR 233; *Adie & Sons v Insurances Corp Ltd* (1898) 14 TLR 544.

7 Frequently these terms are indicated merely by referring to the usual or standard form of policy used by the insurers in question. Where the proposal is for a policy in the ordinary form, the insured must be taken to have agreed to its terms without proof that he has approved them in detail: see PARA 73 post.

8 *General Accident Insurance Corpn v Cronk* (1901) 17 TLR 233; *Acme Wood Flooring Co v Marten* (1904) 9 Com Cas 157.

9 *Canning v Farquhar* (1886) 16 QBD 727, CA, followed in *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977, Ct of Sess; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC. But the traditional analysis of business activity into invitations to treat, offer and acceptance, or counter-offer and acceptance, presupposes an orderliness of thought which is seldom encountered in practice: *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep 386 at 392; affd [1979] 2 Lloyd's Rep 334, CA.

10 *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291.

11 Insurances are normally for one year in fire and burglary. As to fire insurance see PARA 591 et seq post, and as to burglary insurance see PARA 644 et seq post. Personal accident insurances are often for short periods such as one month; see further PARA 567 et seq post. The commencement date is normally indicated by the policy.

12 See eg *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL.

13 As to assessment of the premium see PARA 129 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(2) FORMATION OF A CONTRACT TO INSURE/71. Discrimination in the provision of insurance services or facilities.

71. Discrimination in the provision of insurance services or facilities.

It is unlawful¹ for any person concerned with the provision, whether for payment or not, of insurance facilities to the public or a section of the public to discriminate on the grounds of sex or race² against a person who seeks to obtain or use those facilities by:

- 48 (1) refusing or deliberately omitting to provide him or her with them³; or
- 49 (2) refusing or deliberately omitting to provide him or her with facilities of the same quality, in the same manner and on the same terms as are normal in relation to other members of the public or other members of that section of the public⁴.

A term of a contract the inclusion of which constitutes, or is in furtherance of, or provides for, unlawful discrimination against a party to the contract is unenforceable against that party⁵.

It is also unlawful for a provider of insurance facilities, whether for payment or not, to the public or a section of the public to discriminate against a disabled person:

- 50 (a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide;
- 51 (b) in failing to comply with any duty imposed on him to make adjustments so as to make his services accessible to disabled persons⁶, where the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;
- 52 (c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or
- 53 (d) in the terms on which he provides a service to the disabled person⁷.

Any term in a contract is void so far as it purports to require a person to do anything which would contravene these provisions, exclude or limit their operation, or prevent any person from making a claim under them⁸.

It is not unlawful discrimination where the treatment of a disabled person is based upon information (for example, actuarial or statistical data or a medical report) which is relevant to the assessment of the risk to be insured, is from a source on which it is reasonable to rely, and the treatment is reasonable having regard to the information relied upon and any other relevant factors⁹.

Where an insurer enters into arrangements with an employer under which the employer's employees, or a class of his employees, receive insurance services¹⁰ provided by the insurer, or are given an opportunity to do so, the insurer discriminates unlawfully against a disabled employee¹¹ if he acts in relation to that person in a way which would be discriminatory if he were providing the service in question to members of the public and the employee was provided with, or was trying to secure the provision of, that service as a member of the public¹².

1 As to enforcement see the Sex Discrimination Act 1975 Pt VII (ss 62-76) (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 413 et seq. See also the Race Relations Act 1976 Pt VIII (ss 53-69) (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARAS 498-504.

2 le under the Sex Discrimination Act 1975 s 1 (as substituted), s 2, or s 4 (as amended) (see s 5(1)(a)), or under the Race Relations Act 1976 s 1 or s 2 (see s 3(3)). As to such discrimination see DISCRIMINATION.

3 Sex Discrimination Act 1975 s 29(1)(a), (2)(c); Race Relations Act 1976 s 20(1)(a), (2)(c).

4 Sex Discrimination Act 1975 s 29(1)(b), (2)(c); however, these provisions do not render unlawful the treatment of a person in relation to an annuity, life assurance policy, accident insurance policy, or similar matter involving the assessment of risk, where the treatment (1) was effected by reference to actuarial or other data from a source on which it was reasonable to rely; and (2) was reasonable having regard to the data and any other relevant factors: s 45; Race Relations Act 1976 s 20(1)(b), (2)(c).

5 Sex Discrimination Act 1975 s 77(2); Race Relations Act 1976 s 72(2).

6 le the duty imposed by the Disability Discrimination Act 1995 s 21: see DISCRIMINATION vol 13 (2007 Reissue) PARA 587.

7 Ibid s 19(1), (2), (3)(e). As to such discrimination see DISCRIMINATION.

8 Ibid s 26(1).

9 See the Disability Discrimination (Services and Premises) Regulations 1996, SI 1996/1836, reg 2. Discrimination in relation to a policy in respect of which the liability to risk of the insurer commenced before 2 December 1996 is not unlawful. However, where an existing policy is due to be renewed, or its terms are due to be reviewed, on or after 2 December 1996, any discrimination which occurs on or after the date that the review or renewal is due is unlawful: see reg 3. Similarly, where a cover document (meaning a certificate or policy issued under a master policy) is due to be renewed, or its terms are due to be reviewed, on or after 2 December 1997 any discrimination which occurs on or after the date that the review or renewal is due is unlawful: see reg 4. For these purposes, 'master policy' means a contract between an insurer and another person under which that person is entitled to issue certificates or policies to individuals, and which details the terms on which that person may do so: reg 4(4).

10 'Insurance services' means services of a prescribed description for the provision of benefits in respect of (1) termination of service; (2) retirement, old age or death; (3) accident, injury, sickness or invalidity; or (4) any other prescribed matter: Disability Discrimination Act 1995 s 18(3). The Disability Discrimination (Description of Insurance Services) Regulations 1999, SI 1999/2114, prescribe 'group insurance' for the purpose of this section.

11 'Employee' means in the case of an arrangement which applies to employees of the employer in general one of those employees, or in the case of an arrangement which applies to a class of employees an employee who is in that class: Disability Discrimination Act 1995 s 18(3); it includes a person who has applied for, or is contemplating applying for, employment by that employer or (as the case may be) employment by him in the class in question: s 18(4).

12 Ibid s 18(1), (2).

UPDATE

71 Discrimination in the provision of insurance services or facilities

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--Sex Discrimination Act s 45 now s 45(1); see s 45(2)-(5); and DISCRIMINATION vol 13 (2007 Reissue) PARA 397.

TEXT AND NOTE 9--SI 1996/1836 (as amended) revoked: SI 2006/887.

TEXT AND NOTES 10-12--Omitted: Disability Discrimination Act 2005 s 11(1).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(2) FORMATION OF A CONTRACT TO INSURE/72. Acceptance of the offer.

72. Acceptance of the offer.

Unqualified acceptance of an insurance proposal in the normal form completes the contract¹; the insurers are bound to issue a policy, and the proposer to accept and pay the premium², in accordance with the stipulations of the proposal³. The insurers cannot then seek to introduce variations by issuing a policy containing different terms⁴, although if they do the proposer may be bound by the varied terms if, with their knowledge, he indicates by word or act his assent to the variation of the terms already agreed⁵. However, if there has not as yet been agreement on the basic terms such a variation constitutes a counter offer which requires acceptance by the proposer before there is a conclusion of the negotiations⁶. In the normal case there is conclusive acceptance of a proposal if a policy is issued in accordance with the proposal⁷; the insurers cannot then allege that there was no proposal⁸, and a formal issue of the policy to the proposer is unnecessary if execution takes the form of sealing⁹. Indeed, although a policy in writing is necessary for enforcement in marine insurance¹⁰, in other forms of insurance there is no legal necessity¹¹. Any positive act indicative of an intention to create a contract may be sufficient acceptance¹². Thus there is acceptance by receipt of the premium without demur or qualification¹³ or conduct precluding the insurers from disputing receipt of the premium¹⁴. A demand for the premium may be sufficient¹⁵. Where the form of prior acceptance does not preclude the imposition of a new condition, acceptance may be conditional and then performance of the condition operates as the initiation of the contract¹⁶.

1 An insured may have a right to withdraw from the contract under the provisions of the Financial Services Authority Handbook published by the authority pursuant to the Financial Services and Markets Act 2000 s 153: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 22.

2 *General Accident Insurance Corpn v Cronk* (1901) 17 TLR 233; *Adie & Sons v Insurances Corpn Ltd* (1898) 14 TLR 544; *Star Fire and Burglary Insurance Co v Davidson* (1902) 5 F 83, Ct of Sess.

3 *Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17; *Adie & Sons v Insurances Corpn Ltd* (1898) 14 TLR 544.

4 *Canadian Casualty and Boiler Insurance Co v Boulter Davies & Co and Hawthorne & Co* (1907) 39 SCR 558; *General Accident Insurance Corpn v Cronk* (1901) 17 TLR 233; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 430, CA; see also *Griffiths v Fleming* [1909] 1 KB 805 at 818, CA; and PARA 73 post.

5 *Ramsgate Victoria Hotel Co v Montefiore* (1866) LR 1 Exch 109; *Dunlop v Higgins* (1848) 1 HL Cas 381.

6 *Canning v Farquhar* (1886) 16 QBD 727 at 731, CA, per Lord Esher MR; *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977, Ct of Sess; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC.

7 *Pearl Life Assurance Co v Johnson* [1909] 2 KB 288, DC; *M'Elroy v London Assurance Corpn* (1897) 24 R 287 at 291, Ct of Sess.

8 *Pearl Life Assurance Co v Johnson* [1909] 2 KB 288, DC.

9 *Roberts v Security Co* [1897] 1 QB 111, CA.

10 See the Marine Insurance Act 1906 s 22; and PARA 220 post.

11 *Murfitt v Royal Insurance Co Ltd* (1922) 38 TLR 334, followed in *Parker & Co (Sandbank) v Western Assurance Co* [1925] WC & Ins Rep 82.

- 12 *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep 386; affd [1979] 2 Lloyd's Rep 334, CA.
- 13 *Canning v Farquhar* (1886) 16 QBD 727 at 731, CA; *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co's Claim* (1887) 57 LT 241 at 243; cf *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5 at 15; *Harrington v Pearl Life Assurance Co Ltd* (1913) 30 TLR 24 (affd (1914) 30 TLR 613, CA).
- 14 *Re Economic Fire Office Ltd* (1896) 12 TLR 142.
- 15 *Xenos v Wickham* (1866) LR 2 HL 296 at 308 per Pigott B.
- 16 *Canning v Farquhar* (1886) 16 QBD 727, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(2) FORMATION OF A CONTRACT TO INSURE/73. Contractual effect of new terms in the policy.

73. Contractual effect of new terms in the policy.

It sometimes happens that a particular condition appears for the first time, at any rate in a precise form, in the policy itself. The question then arises whether the issue of the policy is merely part of the negotiation between the parties, in which case there is no contract unless and until there has been some acceptance of it by the proposer¹, or whether the policy as issued is, or contains the terms of, the contract. If the parties have already arrived in substance at a complete agreement a new term cannot be introduced by the insurers in issuing a policy except on the basis that it requires a new acceptance so as to amount to a variation of the prior agreement². If there is no new acceptance the insurers are obliged to issue a policy which conforms with the prior agreement³. Once a firm contract has been entered into neither party can resile from any of the agreed terms or seek to introduce new terms which have never been agreed⁴. The proposer may decline to be bound by the new terms suggested and may take proceedings to enforce the issue of a policy on the basis of the agreed terms or to rectify a policy which does not comply with those terms⁵. Where, however, the proposer seeks to set up a prior contract he must show that the contract amounted to a full agreement as to the details of the terms of the insurance. Where he relies on the acceptance of a proposal which was a proposal for a policy containing the insurers' usual terms and conditions for such an insurance, he cannot object to the inclusion of those terms and conditions in the policy⁶. If the proposer does not intend to accept the new terms he may return the policy unless he has committed himself to taking it; if he does nothing his tacit acquiescence by itself will probably not be construed as an approval⁷; but any positive action by which he recognises or seeks to enforce the policy will amount to an affirmation of it⁸, and once he has made such an affirmation he cannot seek to set it aside⁹.

1 *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL; see CONTRACT vol 9(1) (Reissue) PARAS 631, 650 et seq.

2 *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433 at 434, HL, per Lord Loreburn LC; *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977, Ct of Sess, following *Canning v Farquhar* (1886) 16 QBD 727, CA.

3 *Collett v Morrison* (1851) 9 Hare 162 at 176 per Turner V-C; *Griffiths v Fleming* [1909] 1 KB 805 at 817, CA, per Farwell LJ.

4 *McElroy v London Assurance Corpn* (1897) 24 R 287 at 290, Ct of Sess, per Lord M'Laren; *Pearl Life Assurance Co v Johnson* [1909] 2 KB 288.

5 As to rectification see PARA 92 post.

6 *General Accident Insurance Corpn v Cronk* (1901) 17 TLR 233 (insurance against drivers' accidents; time limit for notification of accidents); *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 425, CA, per Fletcher Moulton LJ (but see also at 431 per Farwell LJ) (workmen's compensation; condition as to keeping wages' book); and see *Acme Wood Flooring Co Ltd v Marten* (1904) 90 LT 313.

7 For the need to communicate acceptance of an offer and the circumstances in which communication may be deemed to be dispensed with see CONTRACT vol 9(1) (Reissue) PARA 642.

8 *Baker v Yorkshire Fire and Life Assurance Co* [1892] 1 QB 144 at 145 per Lord Coleridge CJ; *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255 at 264, HL, per Lord Eldon.

9 *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328; *British Equitable Assurance Co Ltd v Baily* [1906] AC 35, HL; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL. The suggestion in *Re Bradley and Essex and*

Suffolk Accident Indemnity Society [1912] 1 KB 415 at 430, CA, per Farwell LJ, that the insured can affirm the policy without being bound by the new term seems to be inconsistent with these authorities.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(3) INTERIM CONTRACTS OF INSURANCE/74. Principles affecting interim insurance.

(3) INTERIM CONTRACTS OF INSURANCE

74. Principles affecting interim insurance.

Where a proposal is submitted through the insurer's agent, the agent is usually not authorised to accept the proposal himself¹, but must pass it on to the insurers for a decision to accept it or not. There then exists a lapse in time between the submission and acceptance and it has become well established commercial practice, particularly in motor vehicle insurance², to issue interim insurance cover pending either completion of a detailed proposal or consideration of a proposal which has been completed and submitted; alternatively a form of acceptance may be in use which itself defines the scope of interim insurance pending the issue of a formal policy. The issue of such interim insurance falls within the authority of an insurance agent³ unless he is excluded, expressly or impliedly, by the terms of his authority, from committing his principal in that way⁴. There must, of course, be a contract for the grant of such an interim insurance, however informally⁵, and being a contract of insurance, stringent attention will be paid to the duty on the proposer to make full and frank disclosure of material facts if the grant is being made without the proposer signing anything⁶.

1 *Hancock v Macnamara* (1868) IR 2 Eq 486.

2 See *Julien Praet et Cie SA v H G Poland Ltd* [1960] 1 Lloyd's Rep 420 at 428 per Pearson J; on appeal sub nom *Poland v Julien Praet et Cie SA* [1961] 1 Lloyd's Rep 187, CA.

3 *Mackie v European Assurance Society* (1869) 21 LT 102; *Murfitt v Royal Insurance Co Ltd* (1922) 38 TLR 334; *Stockton v Mason and Vehicle and General Insurance Co Ltd and Arthur Edward (Insurance) Ltd* [1978] 2 Lloyd's Rep 430, CA.

4 *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229; *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291; *Richards v Port of Manchester Insurance Co Ltd* (1934) 152 LT 261 (affd 152 LT 413, CA); cf *Rossiter v Trafalgar Life Assurance Association* (1859) 27 Beav 377.

5 *Murfitt v Royal Insurance Co Ltd* (1922) 38 TLR 334, followed in *Parker & Co (Sandbank) v Western Assurance Co* [1925] WC & Ins Rep 82.

6 *Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228, NSW SC, where the proposer failed to disclose a previous accident in which the life insured (subsequently deceased) was involved. As to the duty to disclose material facts see PARA 36 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(3) INTERIM CONTRACTS OF INSURANCE/75. Cover notes.

75. Cover notes.

The usual method in which interim insurance is granted is by a cover note which is, in practice¹, printed in common form. Normally a cover note incorporates the terms and conditions of the insurers' standard form of policy, either by express reference² or by reference to a signed proposal which incorporates the standard form³; if the proposer is to be bound by the standard terms and conditions, it must be shown that in some other way he has agreed to accept them⁴. Subject to such an incorporation of the standard terms and conditions, a cover note is a contract of insurance distinct from the contract comprised in the policy, even where a policy is issued⁵. The cover note is superseded by the subsequent issue of a policy⁶, but the parties' rights and liabilities in respect of any loss which happens during the currency of the cover note normally fall to be determined by reference to the terms of the cover note, not to the terms of the subsequent policy⁷.

No formal document is necessary; a verbal agreement for cover is sufficient⁸.

¹ Cover notes are not issued in life assurance. As to the distinction between a cover note and an insurance 'slip' see PARA 77 post.

² *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96, PC; *General Accident, Fire and Life Assurance Corp Ltd v Shuttleworth* (1938) 60 Ll L Rep 301.

³ *Wyndham Rather Ltd v Eagle Star and British Dominions Insurance Co Ltd* (1925) 21 Ll L Rep 214, CA; *Neil v South-East Lancashire Insurance Co* 1932 SC 35; *Houghton v Trafalgar Insurance Co Ltd* [1953] 2 Lloyd's Rep 18 (affd on another point [1954] 1 QB 247, [1953] 2 All ER 1409, [1953] 2 Lloyd's Rep 503, CA).

⁴ *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA; *Irving v Sun Insurance Office* [1906] ORC 24; *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350.

⁵ *Mackie v European Assurance Society* (1869) 21 LT 102; *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96, PC; *General Accident, Fire and Life Assurance Corp Ltd v Shuttleworth* (1938) 60 Ll L Rep 301.

⁶ *Roberts v Security Co* [1897] 1 QB 111 at 115, CA.

⁷ *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA; *Parker & Co (Sandbank) v Western Assurance Co* [1925] WC & Ins Rep 82; cf *Burton and Watts v Batavia Sea and Fire Insurance Co* [1922] SASR 466; *Ellerbeck Collieries Ltd v Cornhill Insurance Co Ltd* [1932] 1 KB 401, CA.

⁸ *Stockton v Mason and Vehicle and General Insurance Co Ltd and Arthur Edward (Insurance) Ltd* [1978] 2 Lloyd's Rep 430, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(3) INTERIM CONTRACTS OF INSURANCE/76. Duration of cover note.

76. Duration of cover note.

The acceptance of the proposal brings the cover note to an end¹. If, within the period for which a cover note is in force², the insurers decide not to issue a formal policy they must give notice to the proposer terminating the cover note; otherwise they are liable for the full period of the cover note³. Even if they do give notice they are liable for any loss occurring before the notice has been received⁴. The cover note expires automatically on the expiration of the stipulated period of its life, and no notice of its expiration or of a subsequent declining of the proposal is necessary⁵.

1 *Roberts v Security Co* [1897] 1 QB 111, CA; cf *Davies v National Fire and Marine Insurance Co of New Zealand* [1891] AC 485, PC.

2 A cover note is normally expressed to remain in force for a specified period unless cancelled by the insurers. As to computation of time see *Cartwright v MacCormack (Trafalgar Insurance Co Ltd, third party)* [1963] 1 All ER 11, [1963] 1 WLR 18, CA.

3 *Stockton v Mason and Vehicle and General Insurance Co Ltd and Arthur Edward (Insurance) Ltd* [1978] 2 Lloyd's Rep 430, CA.

4 *Mackie v European Assurance Society* (1869) 21 LT 102.

5 *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC; *General Accident, Fire and Life Assurance Corp'n v Robertson* [1909] AC 404, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(3) INTERIM CONTRACTS OF INSURANCE/77. Insurance slips.

77. Insurance slips.

When insurance is effected at Lloyd's, use is made of a slip¹. The slip is a document prepared by the broker containing a description of the proposer, a description of the subject matter and the total amount for which it is to be insured, a statement as to what perils are to be insured against (often by reference to Lloyd's or other London market standard terms), the commencement date and the duration of the insurance². The slip is used by the underwriter to assess the risk which he is invited to cover. The slip is in law an offer, put forward on behalf of the applicant by his broker, and which is presented successively to underwriters for their acceptance. An underwriter's acceptance of the offer in the slip is marked by signing, or 'scratching', the slip and adding the percentage of the risk which the underwriter is prepared to accept³. Having scratched the slip each underwriter is bound separately to the terms of the slip for the agreed percentage of his subscription. The slip constitutes a series of full and binding contracts in its own right, and no one underwriter's subscription can subsequently be varied by the insertion of additional terms by later underwriters⁴. No underwriter has the right to withdraw from the slip even if it is not in due course fully subscribed, and the only permissible unilateral variation to the slip arises from the custom of the Lloyd's market, where the slip is oversubscribed and each underwriter's subscription is 'signed down' so that the total subscription does not exceed 100 per cent⁵.

As far as facultative reinsurance⁶ is concerned, the slip will normally have appended to it the terms of the direct policy, and the slip itself will consist of no more than a small number of terms. The most important of these is the 'full reinsurance' clause whereby the terms of the direct policy are incorporated into the reinsurance (by the phrase 'as original') and the reinsurer agrees to follow the settlements of the reinsured⁷.

There is a vital difference between a cover note⁸ and a slip. Once a slip is scratched it operates as a final acceptance of the proposal, binding the insurers to issue a policy in accordance with its terms⁹. In contrast, a cover note, as that term is used outside the Lloyd's market¹⁰, commits the insurers to nothing; they may decline the proposal¹¹ without obligation to give any reasons for doing so¹². It was at one time thought that a slip is no more than a provisional contract, replaced in its entirety in due course by the issue of a policy. However, it is now apparent that this is not the case, and that the slip is a contractual document in its own right; it will be replaced by the policy only where the parties so intend, so that even if a policy is issued the slip may in some circumstances retain priority in the event of inconsistency between slip and policy¹³. In reinsurance cases it is common for no policy ever to be issued, the slip being described as a 'slip policy'.

1 The slip is the most important, although not the only, method by which agreement may be reached. It is possible for the parties to have reached agreement in advance of the slip being prepared and circulated to the market, although this is unlikely: *Assicurazioni Generali v Arab Insurance* [2002] EWCA Civ 1642, [2003] All ER (Comm) 140, [2003] Lloyd's Rep IR 131; *Sun Life Assurance Company of Canada v CX Reinsurance Company Ltd* [2003] EWCA Civ 283. As to Lloyd's see PARA 24 ante.

2 See *Grover and Grover Ltd v Matthews* [1910] 2 KB 401, per Hamilton J.

3 *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 790, per A L Smith LJ; *rvsd* without affecting this point *sub nom Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL.

4 The contrary suggestion, by Donaldson J in *Jaglom v Excess Insurance Co Ltd* [1972] 2 QB 250, [1972] 1 All ER 267, cannot stand with *General Reinsurance Corp'n v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, [1983] 3 WLR 318, CA.

- 5 General Reinsurance Corpn v Forsakringsaktiebolaget Fennia Patria [1983] QB 856, [1983] 3 WLR 318, CA.
- 6 As to facultative reinsurance see PARA 766 post.
- 7 As to follow the settlements clauses see PARA 776 post; as to reinsurance generally see PARAS 766-779 post.
- 8 As to cover notes see PARAS 75-76 ante.
- 9 Re Yager and Guardian Assurance Co (1912) 108 LT 38 at 43; see also Thompson v Adams (1899) 23 QBD 361; Grover and Grover Ltd v Matthews (1910) as reported in 15 Com Cas 249.
- 10 A cover note in Lloyd's practice is an entirely separate document, which is sent by the broker to his client once the slip has been fully subscribed and which sets out the terms upon which the insurance has been placed. A cover note of this type has no contractual significance as between the proposer and the underwriters but is simply a document sent for information by the broker. It cannot be used as evidence of the terms of the slip or of any policy subsequently issued.
- 11 Citizens Insurance Co of Canada v Parsons (1881) 7 App Cas 96 PC; see PARA 270 post.
- 12 Mackie v European Assurance Society (1869) 21 LT 102.
- 13 See the judgment of Rix LJ in HIH Casualty and General Insurance Co v New Hampshire Insurance Co [2001] EWCA Civ 735, [2001] 1 Lloyd's Rep 378, [2001] Lloyd's Rep IR 596.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(i) Form of the Policy/78. The policy.

(4) THE POLICY

(i) Form of the Policy

78. The policy.

In relation to contracts of non-marine insurance there are no statutory requirements comparable with those contained in the Marine Insurance Act 1906 prescribing the form of document to be used or the minimum particulars to be contained in it¹ although printed standard forms are normally used². Therefore, any document which contains the terms of the contract may be treated as, or even called, a policy³.

The rights of the parties are governed by the terms of the policy alone. It is possible, however, that another document such as the proposal is incorporated with the policy, in which case both documents should be read together. Whether the documents are incorporated is a matter of construction⁴.

There will usually be an express term stating the duration of the policy⁵, although it may be brought to an end, with the consent of the parties, before the expiration of the stated period⁶.

1 See the Marine Insurance Act 1906 ss 22-24; and PARAS 220-221 post.

2 However, it appears that there is no rule of law under which a parol contract of non-marine insurance would be invalid.

3 *Re Norwich Equitable Fire Insurance Society, Royal Insurance Co's Claim* (1887) 57 LT 241 at 246 per Kay J; *Re Profits and Income Insurance Co* [1929] 1 Ch 262 at 269 per Romer J; *Forsikringsakt National of Copenhagen v A-G* [1925] AC 639 at 642, HL, per Lord Cave LC.

4 *Ikerigi Compania Naviera SA v Palmer, The Wondrous* [1992] 2 Lloyd's Rep 566; *Home Insurance Co of New York v Victoria-Montreal Fire Insurance Co* [1907] AC 59, PC.

5 *Allis-Chalmers Co Ltd v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL.

6 *Bamberger v Commercial Credit Mutual Assurance Co* (1855) 15 CB 676; *Sickness and Accident Assurance v General Accident Assurance Corp* (1892) 19 R 977, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(i) Form of the Policy/79. Contents of policy.

79. Contents of policy.

In form, a policy is a unilateral undertaking by the insurers¹ to pay the sum insured on the happening of the specified event; unless and until rectified² it is the exclusive record of the contract³. It contains four main sections, namely:

- 54 (1) the recitals⁴ which are usually inserted into a policy;
- 55 (2) the operative words⁵, defining the nature and scope of the risk insured;
- 56 (3) the special particulars appropriate to the particular contract, such as the name, address and occupation of the insured, the subject matter of the insurance, the amount of the insurance, the period of the insurance, the premium and similar matters, which are usually inserted in a schedule; and
- 57 (4) the general conditions⁶ to which the contract is subject, which are usually incorporated by words of reference in the operative part⁷.

If there are to be any special conditions introduced to the policy, or the policy is to be subject to any variations, they must be mutually agreed⁸ and in writing⁹. Alterations to the policy are usually recorded on slips called indorsements¹⁰.

1 *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328 at 330 per Blackburn J.

2 As to rectification see PARA 92 post.

3 *British Equitable Assurance Co Ltd v Baily* [1906] AC 35 at 41, HL, per Lord Lindley.

4 As to the recitals see PARA 80 post.

5 As to the operative words see PARA 81 post.

6 As to the general conditions see PARA 82 post.

7 *Everett v Desborough* (1829) 5 Bing 503 at 517 per Best CJ; see also *Solvency Mutual Guarantee Co v York* (1858) 3 H & N 588; *Caledonian Insurance Co v Gilmour* [1893] AC 85 at 90, HL, per Lord Herschell.

8 *Langham v Cologan* (1812) 4 Taunt 330; *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179 at 182 per Blackburn J.

9 *Robinson v Tobin* (1816) 1 Stark 336.

10 See *Royal Exchange Assurance v Hope* [1928] Ch 179, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(i) Form of the Policy/80. Recitals.

80. Recitals.

The recitals are always subject to being overridden by the operative words if the latter are clear and unambiguous¹. Recitals are of some importance in certain circumstances, namely:

- 58 (1) where the policy is under seal, in which case a recital may operate as an estoppel to preclude the insurers from disputing a fact recited²;
- 59 (2) resolving a doubt as to ambiguity or vagueness of the operative words³; and
- 60 (3) where other documents or parts of documents are incorporated into the contract.

The document most commonly incorporated is the proposal⁴, but a prospectus⁵ or schedule⁶ or another policy⁷ may be incorporated as well. If the documents are not incorporated by the recital they merely record steps in the negotiations and form no part of the contract⁸, and recourse can only be had to them for limited purposes⁹.

1 *Blascheck v Bussell* (1916) 33 TLR 74 at 75, CA, per Swinfen Eady J; see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 217-223.

2 *Roberts v Security Co* [1897] 1 QB 111, CA, distinguished in *Equitable Fire and Accident Office v Ching Wo Hong* [1907] AC 96, PC; *Anglo-Californian Bank v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1. Policies under seal are rarely used now. See also *Pearl Life Assurance Co v Johnson* [1909] 2 KB 288, DC (recital that there was a formal proposal could not be avoided by insurers). As to estoppel see PARA 113 post.

3 *Notman v Anchor Assurance Co* (1858) 4 CBNS 476 at 480 per Cockburn CJ. As to the operative words see PARA 81 post.

4 If the policy and proposal are inconsistent with each other, the policy, being the later document, prevails: *Kaufmann v British Surety Insurance Co Ltd* (1929) 45 TLR 399. As to the insurer's duty to exercise good faith in a prospectus or invitation to take out insurance see PARA 50 ante.

5 *Routledge v Burrell* (1789) 1 Hy Bl 254, followed in *Worsley v Wood* (1796) 6 Term Rep 710.

6 *Sillem v Thornton* (1854) 3 E & B 868.

7 *Sulphite Pulp Co v Faber* (1895) 1 Com Cas 146. In facultative reinsurance, where an individual policy is reinsured, the reinsurance policy may incorporate the original policy; in this case, the necessary modifications must be made to adapt the original terms to a reinsurance (*Re Athenaeum Life Assurance Society, ex p Prince of Wales Life Assurance Society* (1859) John 633; *Excess Insurance Co v Mathews* (1925) 31 Com Cas 43), and any inconsistent terms must be rejected (*Home Insurance Co of New York v Victoria-Montreal Fire Insurance Co Ltd* [1907] AC 59, PC). See also *HIH Casualty and General Insurance Co v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 1 Lloyd's Rep 378, [2001] Lloyd's Rep IR 596. Cf *Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476 (arbitration clause in insurance policy not incorporated, via reinsurance contract, in retrocession contract). See further PARAS 385, 766-779 post.

8 *British Equitable Assurance Co v Baily* [1906] AC 35, HL; *Griffiths v Fleming* [1909] 1 KB 805 at 817, CA, per Farwell LJ; see, however, *Sun Life Assurance Co of Canada v Jervis* [1943] 2 All ER 425, CA, where it was held that the contract included an 'illustration' which was sent to the plaintiff by the defendant insurance company and purported to show the benefits payable under the proposed policy, without which the application for insurance was not intelligible, and the policy was ordered to be rectified so as to give effect to the contract contained in the 'illustration' and proposal form. As to rectification generally see PARA 92 post.

9 Eg as aids in interpreting ambiguities in the policy (see PARA 85 text to note 13 post) or as containing collateral bargains (*Thiselton v Commercial Union Assurance Co* [1926] Ch 888; see further PARA 89 text to note 7 post) or as indicating what the real contract was, where the policy is challenged as not conforming to the real

contract (*Wood v Dwaris* (1856) 11 Exch 493; *Griffiths v Fleming* [1909] 1 KB 805, CA; *Collett v Morrison* (1851) 9 Hare 162). The direct way of raising the issue as to whether such documents may be referred to is to claim rectification (as to which see PARA 92 post), but the court, in its equitable jurisdiction, may dispense with the formality of such a prayer appearing on the pleadings (*Wood v Dwaris* supra). Consequently the judgments do not always show clearly the grounds on which letters, prospectuses, advertisements etc have been taken into consideration: see *R Smith & Son v Eagle Star and British Dominions Insurance Co Ltd* (1934) 50 TLR 208, CA; *Salvin v James* (1805) 6 East 571.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(i) Form of the Policy/81. Operative words.

81. Operative words.

The operative words are the substance of the policy, defining the nature and extent of the risk against which the insurance is effected. Where the operative words are precise, clear and unambiguous they will prevail over the recitals¹.

¹ *Blascheck v Bussell* (1916) 33 TLR 74 at 75, CA, per Swinfen Eady LJ; *Lazard Bros & Co Ltd v Brooks* (1932) 43 Ll L Rep 372, HL; *Anglo-International Bank Ltd v General Accident Fire and Life Assurance Corp'n Ltd* (1934) 48 Ll L Rep 151 at 155, HL, per Lord Russell of Killowen. As to the rules which govern the interpretation of policies see PARAS 83-89 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(i) Form of the Policy/82. General conditions.

82. General conditions.

The general conditions cover a variety of matters, such as giving notice of any accident or other event giving rise to a claim or potential claim, furnishing evidence in support of a claim, permitting the insurers to take charge of litigation, the respective rights of the insurers and the insured to cancel the policy, furnishing information on matters relating to the insurance, submitting to medical examination and so forth. In the case of insurance companies the general conditions usually contain an arbitration clause, either in simple form or in the form which makes an arbitrator's award a condition precedent to the bringing of any proceedings¹. Finally, there will almost always be found among the conditions a clause providing that the due observance of the terms, provisos, conditions and indorsements in the policy, so far as they relate to anything to be done or complied with by the insured, and the truth of the statements and answers made in the proposal, are to be conditions precedent to any liability of the insurers to make any payment under the policy².

1 As to arbitration as a condition precedent to bringing any proceedings see PARA 188 post; as to the statutory jurisdiction to stay proceedings where an arbitration agreement applies see ARBITRATION vol 2 (2008) PARA 1222. As to the agreement reached between certain insurers to refrain from insisting on the enforcement of arbitration clauses in relation to questions of liability see PARA 1 text and note 3 ante. As to the interpretation of a clause in a policy by which a claim is to be paid unless a Queen's Counsel advises that it could be successfully contested by the insured see PARAS 695-696 post.

2 As to conditions precedent to liability under a policy see PARA 96 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/83. Factors governing interpretation.

(ii) Interpretation of the Policy

83. Factors governing interpretation.

A policy of insurance is a document in writing; it is a contractual document and a commercial document, designed to fulfil well recognised commercial purposes and presumed to be made with due regard to well recognised commercial habits and practices. Each of these broad propositions produces a number of subsidiary rules governing its interpretation¹.

¹ The most important statement of principle as regards the interpretation of commercial contracts is to be found in the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL. A policy of insurance is subject to the same general rules of interpretation as any other written contract: *Smith v Accident Insurance Co* (1870) LR 5 Exch 302 at 307 per Martin B. The principles governing the interpretation of written documents are fully discussed in DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq. It is only intended in this title to summarise these principles as evidenced by insurance cases. As to the proper law of a foreign insurance policy see *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 QB 352, [1962] 2 All ER 214; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1989] 1 All ER 402, HL; and CONFLICT OF LAWS. Generally, once a trial judge has made findings of fact on which his interpretation of the policy is based, an appellate court will not set them aside unless it is satisfied that he has erred: *Bohl v Great West Life Assurance Co* [1974] 1 WWR 700, Sask CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/84. Actual language to be construed.

84. Actual language to be construed.

The fact that the document is in writing involves the application of the principle that what has to be considered is the actual language used in the policy¹ and in any documents which are contractual by virtue of being incorporated in the policy², this being the language which the parties themselves have chosen to express their bargain³. When presented with a conflict between the parties as to the meaning of the policy, the court's function is to interpret what the parties have in fact said in their contract, not to speculate as to what they may have intended when entering into the contract⁴. What the parties have in fact said may be comprised in the words they have used; the problem is to ascertain what the words mean⁵. It is not the court's function, by a process of construction, to make for the parties a reasonable contract which they have not made for themselves⁶. If the words are clear, precise and unambiguous effect must be given to them, however unreasonable the result may be⁷.

1 *Want v Blunt* (1810) 12 East 183 at 187 per Lord Ellenborough CJ; *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73 at 97.

2 Eg the proposal: *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA; *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA.

3 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 610, CA, per Collins LJ; *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd and Kemp* [1980] 1 Lloyd's Rep 523 at 530 per Woolf J; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1989] 1 All ER 402, HL; *Hitchins (Hatfield) Ltd v Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580 at 586, CA, per Parker LJ.

4 *Pearson v Commercial Union Assurance Co* (1863) 15 CBNS 305 at 313 per Erle CJ; *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 609, CA, per Collins LJ; 'The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question therefore resolves itself in a search for the meaning of language in its contractual setting ... the court must not try to divine the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background': *Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717 at 724, [1995] 1 WLR 1580 at 1587, HL per Lord Steyn.

5 *Mann v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1, [2001] 1 All ER (Comm) 28, CA (reinsurance); as to how the meaning of the words is to be ascertained see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 169-174.

6 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 609, CA, per Collins LJ; *Cooke and Arkwright v Haydon* [1987] 2 Lloyd's Rep 579 at 582, CA, per Hobhouse J (liability insurance).

7 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 886, CA, per Fletcher Moulton LJ; *Re United London and Scottish Insurance Co Ltd, Brown's Claim* [1915] 2 Ch 167 at 170, CA, per Lord Cozens-Hardy MR; *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669 at 673, CA, per Bankes LJ; see also *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224; *New Hampshire Insurance Co v Strabag AG* [1990] 2 Lloyd's Rep 61 (collective insurance policy).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/85. Words must be given ordinary meaning.

85. Words must be given ordinary meaning.

In any document the words used must prima facie be construed in their plain, ordinary, popular meaning¹ rather than their strictly precise, etymological, philosophic, or scientific meaning². For this purpose the document must be looked at as a whole³. The meaning of a word may be controlled by its context⁴. A particular context may indicate a limited meaning for general words, as where a variety of things of a specific class are enumerated, followed by the words 'et cetera' or 'other property'; such words will be construed as referring only to things of the same genus as the detailed items⁵. A word which is used more than once in the document, in the case of doubt or ambiguity and in the absence of a context to the contrary, may be presumed to bear the same meaning throughout⁶. Unless a contrary intention appears⁷, technical legal terms will be given their technical legal meaning⁸ and technical words their technical meaning⁹. The grammatical construction of the words used must be followed¹⁰, but mere considerations of grammar will not be allowed to frustrate what is plainly the effect of the document when taken as a whole¹¹. Clerical errors may be disregarded¹².

The words to be considered are, in the first instance, the words in the operative part of the policy which prevails over the recitals, but if there is ambiguity in the operative part the recitals may be looked at to see if they throw any light on the difficulty¹³.

1 *Platt v Young* (1843) 2 LTOS 17, 370; *Stanley v Western Insurance Co* (1868) LR 3 Exch 71 at 73 per Kelly CB (gas); *Thomson v Weems* (1884) 9 App Cas 671 at 687, HL, per Lord Watson; *Royal Insurance Co v Westminster Fire Insurance Co* (1887) Post Magazine, 22 January ('building' does not include stained glass); *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750 at 753, CA, per Lord Esher MR; *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 607, CA, per A L Smith LJ; *Rogers v Whittaker* [1917] 1 KB 942 (commenting on *Drinkwater v London Assurance Corp* (1767) 2 Wils 363); *Hansford v London Express Newspaper Ltd* (1928) 44 TLR 349 (following *Harper v Associated Newspapers Ltd* (1927) 43 TLR 331 (vehicle)); *Wulfson v Switzerland General Insurance Co Ltd* [1940] 3 All ER 221 (goods 'in store'); *Eisinger v General Accident Fire and Life Assurance Corp Ltd* [1955] 2 All ER 897, [1955] 1 WLR 869 (loss); *Leo Rapp Ltd v McClure* [1955] 1 Lloyd's Rep 292 (warehouse); *Firmin and Collins Ltd v Allied Shippers Ltd* (Alder, third party) [1967] 1 Lloyd's Rep 633 ('whilst in a public warehouse'); *Princette Models Ltd v Reliance Fire and Accident Insurance Corp Ltd* [1960] 1 Lloyd's Rep 49 ('wherever'); *Hales v Reliance Fire and Accident Insurance Corp Ltd* [1960] 2 Lloyd's Rep 391 (inflammable); *Lewis Emanuel & Son Ltd v Hepburn* [1960] 1 Lloyd's Rep 304 (physical loss or damage or deterioration); *Sadler Bros Co v Meredith* [1963] 2 Lloyd's Rep 293 (in transit); *Mills v Smith (Sinclair, third party)* [1964] 1 QB 30, [1963] 2 All ER 1078 ('caused by accident'); *Clarke v Insurance Office of Australia Ltd* [1965] 1 Lloyd's Rep 308, Vict CA ('ordinarily residing with'); *Frewin v Poland* [1968] 1 Lloyd's Rep 100 (destruction or loss of manuscript); *Woolford v Liverpool County Council* [1968] 2 Lloyd's Rep 256 (policy to cover any injury); *Kumar v Life Insurance Corp of India* [1974] 1 Lloyd's Rep 147 (operation); *Young v Sun Alliance and London Insurance Ltd* [1976] 3 All ER 561, [1977] 1 WLR 104, CA (flood); *Oei v Foster (formerly Crawford) and Eagle Star Insurance Co Ltd* [1982] 2 Lloyd's Rep 170 ('in custody or control of'); *O'Donoghue v Harding* [1988] 2 Lloyd's Rep 281 ('left unattended'); *CTN Cash and Carry Ltd v General Accident, Fire and Life Assurance Corp plc* [1989] 1 Lloyd's Rep 299 ('attended'); *New Hampshire Insurance Co v Strabag AG* [1990] 2 Lloyd's Rep 61 ('otherwise admitted'); *Hitchens (Hatfield) Ltd v Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580, CA ('defective design'); *Mann v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1, [2001] 1 All ER (Comm) 28, CA ('per occurrence'); *Great North Eastern Rly Ltd v Avon Insurance plc* [2001] EWCA Civ 780, [2001] 2 All ER (Comm) 526 ('renew'). A metaphorical expression is not to be taken literally: *Borradaile v Hunter* (1843) 5 Man & G 639 at 657 per Erskine J ('die by his own hands'). See generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 169-174.

2 *Two Hundred Cases of Tea* 9 Wheat 340 (1824) per Storey J; *Stanley v Western Insurance Co* (1868) LR 3 Exch 71; *Scragg v United Kingdom Temperance and General Provident Institution* [1976] 2 Lloyd's Rep 227 ('motor racing' means to those interested in motor sport a circuit race round a course as in a Grand Prix competition and does not include a sprint event, ie one in which competitors are timed against the clock and are started individually at intervals of ten to thirty seconds).

3 *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 at 799 per Blackburn J; *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456, CA, per Lindley LJ; *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750 at 754, CA, per Lopes LJ; *Pennsylvania Co for Insurances on Lives and Granting Annuities v Mumford* [1920] 2 KB 537 at 543, CA, per Lord Sterndale MR; *City Tailors Ltd v Evans* (1921) 126 LT 439, CA; *Gale v Motor Union Insurance Co Ltd* [1928] 1 KB 359; *Pocock v Century Insurance Co Ltd* [1960] 2 Lloyd's Rep 150; *Simon Brooks Ltd v Hepburn* [1961] 2 Lloyd's Rep 43; *Lane v Spratt* [1970] 2 QB 480, [1970] 1 All ER 162; *Cooke and Arkwright v Haydon* [1987] 2 Lloyd's Rep 579, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 169-170.

4 *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798 at 813, CA, per Buckley LJ; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 894, CA, per Buckley LJ; *Rogers v Whittaker* [1917] 1 KB 942 at 943 per Sankey J; see also *Watchorn v Langford* (1813) 3 Camp 422; *Joel v Harvey* (1857) 5 WR 488; *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; *Curtis & Sons v Mathews* [1918] 2 KB 825; and cf *Piddington v Co-operative Insurance Society Ltd* [1934] 2 KB 236; *Williams v Lloyd's Underwriters* [1957] 1 Lloyd's Rep 118; *Kearney v General Accident Fire and Life Assurance Corp Ltd* [1968] 2 Lloyd's Rep 240; *Laurence v Davies (Norwich Union Fire Insurance Society Ltd, third party)* [1972] 2 Lloyd's Rep 231; *Jaglom v Excess Insurance Co Ltd* [1972] 2 QB 250, [1972] 1 All ER 267; *Young v Sun Alliance and London Insurance Ltd* [1976] 2 Lloyd's Rep 189, CA; *Rowlinson Construction Ltd v Insurance Co of North America (UK) Ltd* [1981] 1 Lloyd's Rep 332; *Petrofina (UK) Ltd v Magnaload Ltd* [1983] 2 Lloyd's Rep 91; *Commonwealth Smelting Ltd v Guardian Royal Exchange Assurance Ltd* [1984] 2 Lloyd's Rep 608; *Phillips and Stratton v Dorintal Insurance Ltd* [1987] 1 Lloyd's Rep 482; *Youell v Bland Welch & Co Ltd* [1990] 2 Lloyd's Rep 423; *Hitchens (Hatfield) Ltd v Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580, CA; *Quinta Communications SA v Warrington (Odyssey Re (London) Ltd intervening)* [1999] 2 All ER (Comm) 123, CA; *Mann v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1, [2001] 1 All ER (Comm) 28, CA.

5 See eg *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA; *Lake v Simmons* [1927] AC 487 at 507, HL, per Lord Sumner; *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *Forney v Dominion Insurance Co Ltd* [1969] 3 All ER 831, [1969] 1 WLR 928. A difference of phrasing in different parts of the policy does not necessarily indicate a difference of meaning: *Burridge & Son v F H Haines & Sons Ltd* (1918) 118 LT 681.

6 *Lake v Simmons* [1927] AC 487 at 507, HL, per Lord Sumner; see also *Mair v Railway Passengers Assurance Co Ltd* (1877) 37 LT 356, DC; *Sangster's Trustees v General Accident Assurance Corp Ltd* (1896) 24 R 56, Ct of Sess; *King v Travellers' Insurance Association Ltd* (1931) 48 TLR 53; cf *Ewing & Co v Sicklemore* (1918) 35 TLR 55, CA; and *Sun Fire Office v Hart* (1889) 14 App Cas 98, PC. As to the ejusdem generis rule see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 234.

7 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA (burglary and theft as hereinafter defined).

8 *Debenhams Ltd v Excess Insurance Co Ltd* (1912) 28 TLR 505 (embezzlement); *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA (entry); *London and Lancashire Fire Insurance Co Ltd v Bolands Ltd* [1924] AC 836, HL (riot); *Sturge v Hackett* [1962] 3 All ER 166, CA (legally liable); *Lim Trading Co v Haydon* [1968] 1 Lloyd's Rep 159, Sing HC (theft); *Rigby v Sun Alliance and London Insurance Ltd* [1980] 1 Lloyd's Rep 359 (liability as owners); *Grundy (Teddington) Ltd v Fulton* [1983] 1 Lloyd's Rep 16 (theft); *Aswan M/S Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Ltd* [1989] 1 Lloyd's Rep 289 (liable at law to pay); *Dino Services Ltd v Prudential Assurance Co Ltd* [1989] 1 Lloyd's Rep 379, CA (forcible entry); *Dobson v General Accident Fire and Life Assurance Corp plc* [1989] 2 Lloyd's Rep 549, CA (theft); cf *Equitable Trust Co of New York v Henderson* (1930) 47 TLR 90 (forged). See generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 172.

9 *Anglo-African Merchants v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421 ('new').

10 *Weir v Northern Counties of England Insurance Co* (1879) 4 LR Ir 689 at 693 per Lawson J; *Lewis (Emanuel) & Son Ltd v Hepburn* [1960] 1 Lloyd's Rep 304; *Balfour v Beaumont* [1984] 1 Lloyd's Rep 272, CA.

11 *Re Athenaeum Life Assurance Society, ex p Eagle Insurance Co* (1858) 4 K & J 549 at 555 per Wood V-C.

12 *Glen's Trustees v Lancashire and Yorkshire Accident Insurance Co* (1906) 8 F 915, Ct of Sess, ('not' was wrongly inserted in a condition); *Nittan (UK) Ltd v Solent Steel Fabrication Ltd (t/a Sargrove Automation) and Cornhill Insurance Co Ltd* [1981] 1 Lloyd's Rep 633, CA.

13 As to recitals see PARA 80 ante.

UPDATE

85 Words must be given ordinary meaning

NOTE 2--See *Canelhas Comercio Importacao E Exportacao Ltd v Wooldridge* [2004] EWCA Civ 984, [2005] 1 All ER (Comm) 43 (legal meaning of 'robbery' was inappropriate in determining extent of 'hold-up or robbery' clause).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/86. Intention of parties as test.

86. Intention of parties as test.

The fact that the document records a contract means that the parties' intention is paramount¹. The test is not subjective but strictly objective in that attention can normally be paid only to the language used, but where there is a general intention, as derived from the words, which is clear, this will not be allowed to be frustrated by minor inconsistencies or ambiguities; the document will be construed in such a way as to give efficacy to the transaction in accordance with the maxim *ut res magis valeat quam pereat*². Where two constructions are possible, the one which tends to defeat the intention or to make it practically illusory will be rejected³. Similarly, where a literal construction would lead to a manifest absurdity this will be rejected in favour of a construction which is broad, liberal and reasonable⁴, where both constructions are possible⁵. Words specifically chosen for the particular contract in question will receive more attention than general words; a policy is usually comprised in a form nearly all of which is printed as being required for general use⁶ and written words are then inserted for its application to the particular contract. The printed portions are, of course, part of the contract and the intention evinced by them will, as far as possible, be made effective⁷. However, where there is any inconsistency or repugnancy between what is written and what is printed, the written words will prevail⁸.

1 *Drinkwater v London Assurance Corp* (1767) 2 Wils 363 at 364 per Wilmot CJ; *Tarleton v Staniforth* (1794) 5 Term Rep 695 at 699 per Lord Kenyon CJ (on appeal (1796) 1 Bos & P 471, Ex Ch); *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 at 799 per Blackburn J; *Lombard Australia Ltd v NRMA Insurance Ltd* [1969] 1 Lloyd's Rep 575 at 576 per Wallace A-CJ, and at 578-580 per Holmes JA, NSW CA.

2 *le 'that the thing may rather have effect than be destroyed'*; see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 177.

3 *Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839 at 844, Ex Ch, per Cockburn CJ; *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453 at 456, CA, per Lindley LJ; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 597, CA, per Vaughan Williams LJ; *Langford v Legal and General Assurance Society Ltd* [1986] 2 Lloyd's Rep 103; *Commercial Union Assurance Co plc v Sun Alliance Group plc* [1992] 1 Lloyd's Rep 475.

4 *Borradaile v Hunter* (1843) 5 Man & G 639; *Pim v Reid* (1843) 6 Man & G 1; *Clift v Schwabe* (1846) 3 CB 437; *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782; *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668, Ex Ch; *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA; *Sun Fire Office v Hart* (1889) 14 App Cas 98 at 104, PC; *Daff v Midland Colliery Owners' Mutual Indemnity Co* (1913) 82 LJB 1340, HL; *Burridge & Son v F H Haines & Sons Ltd* (1918) 118 LT 681; *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233; *Simmonds v Cockell* [1920] 1 KB 843; *John Martin of London Ltd v Russell* [1960] 1 Lloyd's Rep 554; *Lombard Australia Ltd v NRMA Insurance Ltd* [1969] 1 Lloyd's Rep 575, NSW CA; *Jason v British Traders' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA. The same principle applies to the questions in the proposal form: *Connecticut Mutual Life Insurance Co of Hartford v Moore* (1881) 6 App Cas 644 at 648, PC.

5 *Barnard v Faber* [1893] 1 QB 340 at 342, CA, per Lindley LJ; and see *Hooper v Accidental Death Insurance Co* (1860) 5 H & N 546 at 559, Ex Ch, per Wightman J; *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 916, HL, per Lord Blackburn; *National Protector Fire Insurance Co Ltd v Nivert* [1913] AC 507 at 513, PC; *E Hulton & Co Ltd v Mountain* (1921) 37 TLR 869 at 870, CA, per Bankes LJ.

6 Phrases which have received judicial construction will normally receive the same construction in later cases (*Clift v Schwabe* (1846) 3 CB 437 at 470 per Parke B; *Glen v Lewis* (1853) 8 Exch 607; *Browning v Phoenix Assurance Co Ltd* [1960] 2 Lloyd's Rep 360 (social, domestic and pleasure purposes); *Louden v British Merchants Insurance Co Ltd* [1961] 1 All ER 705, [1961] 1 WLR 798, CA (injury sustained whilst under the

influence of drugs or intoxicating liquor); *McGoona v Motor Insurers' Bureau and Marsh* [1969] 2 Lloyd's Rep 34 (social, domestic and pleasure purposes)) even though the wording may have been altered (*Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216, DC; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co Ltd* [1909] 1 KB 591, CA); but a decision on one form of words is no authority upon the construction of a different form (*Re Coleman's Depositories and Life and Health Assurance Association* [1907] 2 KB 798 at 812, CA, per Buckley LJ; *Re Calf and Sun Insurance Office* [1920] 2 KB 366 at 382, CA, per Atkin LJ).

7 *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48 at 82 per Lord Campbell CJ.

8 *Home Insurance Co of New York v Victoria-Montreal Fire Insurance Co* [1907] AC 59, PC; *Australian Widows' Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd* [1914] AC 634, PC; *City Tailors Ltd v Evans* (1921) 126 LT 439, CA; *Kaufmann v British Surety Insurance Co Ltd* (1929) 45 TLR 399; *General Accident Fire and Life Corp Ltd v Midland Bank* [1940] 2 KB 388 at 405, CA, per Greene MR; *Eurodale Manufacturing Ltd (t/a Connekt Cellular Communications) v Ecclesiastical Insurance Office plc* [2003] EWCA Civ 203, [2003] All ER (D) 106 (Feb). For the application of the rule to marine policies see PARA 227 post. See generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 211.

UPDATE

86 Intention of parties as test

NOTE 8--*Eurodale*, cited, reported at [2003] Lloyd's Rep IR 444.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/87. Contra proferentem rule.

87. Contra proferentem rule.

Where there is ambiguity in the policy the court will apply the contra proferentem rule¹. Since the printed parts of a non-marine insurance policy, and usually the written parts, are produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured². Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favourable to the insurers will prevail if the insured has created any ambiguity³. This rule, however, only becomes operative where the words are truly ambiguous; it is a rule for resolving ambiguity⁴ and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application⁵.

¹ le from the maxim *verba cartarum fortius accipiuntur contra proferentem* ('the words of deeds are to be interpreted most strongly against the party who puts them forward'). See generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179; for the application and framing of policies in marine insurance see PARA 231 post.

² *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL, per Lord Blackburn, following *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 507 per Lord St Leonards; see also *Tarleton v Staniforth* (1794) 5 Term Rep 695 at 699 per Lord Kenyon; *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 at 799 per Blackburn J; *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122 at 134-135 per Willes J; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 596, CA, per Vaughan Williams LJ, following *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 890, CA, per Fletcher Moulton LJ; *Simmonds v Cockell* [1920] 1 KB 843 at 845 per Roche J; *Lake v Simmons* [1927] AC 487 at 509, HL, per Lord Sumner; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 250, HL, per Lord Russell of Killowen; *Metal Scrap and By-Products Ltd v Federated Conveyors Ltd* [1953] 1 Lloyd's Rep 221; *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA; *Hales v Reliance Fire and Accident Insurance Corp Ltd* [1960] 2 Lloyd's Rep 391 at 396 per McNair J; *Gerhardt v Continental Insurance Companies and Firemen's Insurance Co of Newark* [1967] 1 Lloyd's Rep 380, New Jersey SC; *Woolford v Liverpool County Council* [1968] 2 Lloyd's Rep 256; *Jason v British Traders' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281; *Lane v Spratt* [1970] 2 QB 480, [1970] 1 All ER 162; *Laurence v Davies (Norwich Union Fire Insurance Society Ltd, third party)* [1972] 2 Lloyd's Rep 231; *Kirkbride v Donner* [1974] 1 Lloyd's Rep 549; *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co* (1980) 112 DLR (3d) 49, Can SC; *McLean Enterprises Ltd v Ecclesiastical Insurance Office plc* [1986] 2 Lloyd's Rep 416; *Hitchens (Hatfield) Ltd v Prudential Assurance plc* [1991] 2 Lloyd's Rep 580; *Dodson v Peter H Dodson Insurance Services (a firm)* [2001] 3 All ER 75, [2001] 1 WLR 1012, CA.

³ *Condogianis v Guardian Assurance Co* [1921] 2 AC 125 at 130-131, PC; *Bartlett & Partners Ltd v Meller* [1961] 1 Lloyd's Rep 487; *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Ltd* [1967] 2 Lloyd's Rep 550; *American Airlines Inc v Hope* [1973] 1 Lloyd's Rep 233 at 250, CA, per Roskill LJ (affd [1974] 2 Lloyd's Rep 301, HL).

⁴ *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456, CA, per Lindley LJ; *Cole v Accident Insurance Co Ltd* (1889) 5 TLR 736 at 737, CA, per Lindley LJ; see also *Drinkwater v London Assurance Corp* (1767) 2 Wils 363. Thus the rule is applied where two different meanings are equally possible and it is otherwise impossible to determine which is intended: *London and Lancashire Fire Insurance Co v Bolands Ltd* [1924] AC 836 at 848, HL, per Lord Sumner.

⁵ *Gamble v Accident Assurance Co* (1869) IR 4 CL 204 at 214 per Pigot CB; *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550; *Stolberg v Pearl Assurance Co Ltd* [1970] 2 Lloyd's Rep 421, BC SC; *Marzouca v Atlantic and British Commercial Insurance Co Ltd* [1971] 1 Lloyd's Rep 449, PC; *Jaglom v Excess Insurance Co Ltd* [1972] 2 QB 250, [1972] 1 All ER 267; *Nittan (UK) Ltd v Solent Steel Fabrication Ltd (t/a Sargrove Automation) and Cornhill Insurance Co Ltd* [1981] 1 Lloyd's Rep 633, CA.

UPDATE

87 Contra proferentem rule

NOTE 3--See also *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2006] 1 All ER (Comm) 780.

NOTE 4--If possible, words in an insurance policy which are ambiguous in themselves, should be construed with reference to their context or to the purpose of the policy: *McGeown v Direct Travel Insurance* [2003] EWCA Civ 1606, [2004] 1 All ER (Comm) 609.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/88. Business efficacy as test.

88. Business efficacy as test.

The nature of any contract is not concluded by the name the parties give it but is determined on the substance which it contains; nonetheless, the fact that a contract is described by the parties as a policy of insurance is taken as some guidance on the question whether they intended to enter into a contract of insurance or a guarantee¹. Similarly, where it is plain that the parties were intending to effect a contract of insurance or an insurance of a particular kind, the court will lean against a construction which would defeat this intention or make it substantially ineffective². In cases of ambiguity the leaning will be in favour of the interpretation which tends to give business efficacy to the contract³. Regard will also be had to the known or proved customs and usages⁴ and the phraseology prevalent⁵, either in the insurance business or the insured's trade, these forming part of the context in which the particular words are used⁶.

1 As to the nature of the contract see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 168. As to the distinction between a contract of insurance and a guarantee see PARA 798 post.

2 As to the intention of the parties as a test see PARA 86 ante.

3 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341; *Sheridan v Phoenix Life Assurance Co* (1858) EB & E 156 at 165, Ex Ch, per Pollock CB; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 597, CA, per Vaughan Williams LJ.

4 *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122; *Smith v Accident Insurance Co* (1870) LR 5 Exch 302; *Mint Security Ltd v Blair* [1982] 1 Lloyd's Rep 188; *Commercial Union Assurance Co plc v Sun Alliance Insurance Group plc* [1992] 1 Lloyd's Rep 475; *Baker v Black Sea and Baltic General Insurance Co Ltd* [1998] 2 All ER 833, [1998] 1 WLR 974, HL.

5 *Noble v Kennoway* (1780) 2 Doug KB 510; *Preston v Greenwood* (1784) 4 Doug KB 28; *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73, PC.

6 See *Pocock v Century Co Ltd* [1960] 2 Lloyd's Rep 150; and as to the relevance of the context to the interpretation of particular words see PARA 85 ante.

UPDATE

88 Business efficacy as test

NOTE 3--See also *Brit Syndicates Ltd v Italaudit SpA* [2008] UKHL 18, [2008] 2 All ER 1140.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(ii) Interpretation of the Policy/89. Admissibility of extrinsic evidence.

89. Admissibility of extrinsic evidence.

Since a contract of insurance is one which has been reduced into writing, then, in accordance with general principles, extrinsic evidence is not admissible to explain, contradict, add to, subtract from or otherwise vary it¹. Evidence cannot ordinarily be given, whether orally or by producing prior drafts, to show the course the negotiations took². However, where it is sought to establish the existence of a trade usage³ or of a technical meaning in the trade of a term used⁴, extrinsic evidence is admissible. Where there is an ambiguity in the language used, or where the contract is only fully intelligible in the light of the surrounding circumstances at the time when it was executed⁵, extrinsic evidence directed to these circumstances is admissible⁶. Such evidence is also admissible to prove the existence and contents of a collateral oral agreement⁷ or to support a claim that a written contract ought to be rectified as not truly setting out what was in fact agreed⁸.

1 *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC (where the agent of the insurers varied the terms of the cover note); *Anglo-Californian Bank v London and Provincial Marine and General Insurance Co* (1904) 10 Com Cas 1; *Horncastle v Equitable Life Assurance Society of United States* (1906) 22 TLR 735, CA; see also *Hare v Barstow* (1844) 8 Jur 928; *Platt v Young* (1843) 2 LTOS 17, 370; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127 at 141, CA, per Beldam LJ. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185.

2 As to evidence of previous negotiations see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 187. See also PARA 80 ante.

3 *Clift v Schwabe* (1846) 3 CB 437; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48 at 82 per Lord Campbell CJ; *Woodall v Pearl Assurance Co Ltd* [1919] 1 KB 593, CA; *Scragg v United Kingdom Temperance and General Provident Institution* [1976] 2 Lloyd's Rep 227, QBD; *Mander v Equitas Ltd* [2000] Lloyd's Rep IR 520.

4 *Watchorn v Langford* (1813) 3 Camp 422; *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73; *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA; see also *Hooper v Accidental Death Insurance Co* (1860) 5 H & N 546, Ex Ch; and cf *Hordern Commercial Union Insurance Co* (1887) 56 LJPC 78, PC.

5 *Bank of New Zealand v Simpson* [1900] AC 182 at 188, PC, applied in *Moss v Norwich and London Insurance Association* (1922) 10 Ll L Rep 395, CA (where an employers' liability policy was intended to cover the employer's son).

6 As to the admissibility of evidence as to the surrounding circumstances see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 198.

7 As to evidence of collateral oral agreements see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 196.

8 See eg *Baker v Paine* (1750) 1 Ves Sen 456; *Mackenzie v Coulson* (1869) LR 8 Eq 368; and see further MISTAKE vol 77 (2010) PARA 57 et seq. As to the rectification of insurance policies see PARA 92 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(iii) Binding Effect of the Policy/90. The policy is the contractual document.

(iii) Binding Effect of the Policy

90. The policy is the contractual document.

Although a policy of insurance normally takes the form of a unilateral undertaking by the insurers to make the stipulated payment on the happening of the stipulated event, the contractual terms and conditions it contains are binding on the insured as they are on the insurers¹. The insured cannot, therefore, enforce the insurers' promise as being contractual unless he in his turn has performed any provisions which have to be performed by him to make the contract effective². The insured must pay the premium; he cannot wait to see whether the event insured against occurs or not, then tender the premium and demand fulfilment of the insurers' undertaking. The contract does not normally commence unless and until payment of the premium is made³. However, in the case of subsidiary provisions, such as those relating to the substantiation of a claim, it is probably sufficient if the insured is ready and willing to perform them. If the insurers wrongly repudiate on a ground going to the root of the contract, their conduct may constitute a waiver as regards the performance of these subsidiary provisions⁴.

1 *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328 at 332 per Blackburn J.

2 *Routledge v Burrell* (1789) 1 Hy Bl 254; *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

3 As to payment of premium as commencement of contract see PARA 149 post.

4 As to what constitutes a waiver see PARA 112 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(iii) Binding Effect of the Policy/91. Unfair contract terms.

91. Unfair contract terms.

The Unfair Terms in Consumer Contracts Regulations 1999 apply to unfair terms in contracts concluded between an insurer and a consumer¹. A contractual term which has not been individually negotiated will be regarded as unfair² if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer³. A term is always to be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term⁴. Even where a specific term, or certain aspects of it, has been individually negotiated, the regulations apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract⁵. An insurer must ensure that any written term of a contract is expressed in plain, intelligible language⁶. If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer will prevail⁷. An unfair term is not binding on the consumer, but the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term⁸. The Office of Fair Trading has a duty to consider any complaint made to it that any contract term drawn up for general use is unfair⁹. A term which sets out the risks insured is not unfair if it is framed in plain, intelligible language¹⁰. Conditions precedent imposed by the insurer in relation to the claim are regarded as unfair in so far as they deprive the insured of the benefit of the policy irrespective of the nature of the insured's breach, but are enforceable to the extent that the insured's breach has caused serious prejudice to the insurers¹¹.

1 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 4(1). The regulations do not apply to contractual terms which reflect mandatory statutory or regulatory provisions, or the provisions or principles of international conventions: reg 4(2). 'Consumer' means any natural person who is acting for purposes which are outside his trade, business or profession: reg 3(1). As to the regulations generally see CONTRACT vol 9(1) (Reissue) PARAS 790-796.

2 The unfairness of a contractual term is to be assessed taking into account the nature of the services to be provided and, at the time of conclusion of the contract, all the circumstances attending its conclusion and all the other terms of the contract or of another contract on which it is dependent: *ibid* reg 6(1). As long as it is in plain intelligible language, a term relating to the definition of the main subject matter of the contract, or the price of the services supplied will not be subject to assessment for fairness: reg 6(2).

3 *Ibid* reg 5(1). It is for any insurer who claims that a term was individually negotiated to show that it was: reg 5(4). Schedule 2 contains an indicative and non-exhaustive list of terms which may be regarded as unfair: reg 5(5).

4 *Ibid* reg 5(2).

5 *Ibid* reg 5(3).

6 *Ibid* reg 7(1).

7 *Ibid* reg 7(2).

8 *Ibid* reg 8(1), (2).

9 *Ibid* reg 10(1) (regs 10, 11 amended by virtue of the Enterprise Act 2002 s 2). The Financial Services Authority may notify the Office of Fair Trading that it agrees to consider a complaint, in which case it has a duty to consider that complaint: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 11(1) (as so substituted), Sch 1 (substituted by SI 2001/1186). As to the Financial Services Authority see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4 et seq.

10 *Bankers Insurance Co Ltd v South* [2003] EWHC 380 (QB), [2003] All ER (D) 85 (Mar).

11 *Bankers Insurance Co Ltd v South* [2003] EWHC 380 (QB), [2003] All ER (D) 85 (Mar).

UPDATE

91 Unfair contract terms

NOTE 9--SI 1999/2083 Sch 1 amended: SI 2003/3182, SI 2006/523.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(4) THE POLICY/(iii) Binding Effect of the Policy/92. Rectification.

92. Rectification.

Where the policy issued does not correctly embody a contract previously agreed between the parties, either party may apply for its rectification¹. Rectification will only be granted on the strongest evidence of mutual mistake². Rectification can be claimed after loss has been suffered³. In order to obtain rectification it must be shown that there was a prior agreement between the parties differing from that purporting to be embodied in the policy; if the parties were never in fact in agreement the court may order the policy to be set aside and premiums returned⁴.

1 See eg *Collett v Morrison* (1851) 9 Hare 162; *Sun Life Assurance Co of Canada v Jervis* [1943] 2 All ER 425, CA (see PARA 80 text and note 8 ante); and see PARA 267 post. As to the admission of extrinsic evidence in support of a claim for rectification see PARA 89 ante. As to the remedy of rectification generally see EQUITY; and MISTAKE vol 77 (2010) PARA 57 et seq.

2 *Allom v Property Insurance Co* (1911) Times, Finance, Commerce and Shipping section, 10 February; *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep 301, HL; *Agip SpA v Navigazione Alta Italia SpA, The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353, CA; *Commercial Union Assurance Co plc v Sun Alliance Insurance Group plc* [1992] 1 Lloyd's Rep 475; *Kiriacoulis Lines SA v Compagnie D'Assurances Maritime Aeriennes et Terrestres (CAMAT), The Demetra K* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep 581.

3 *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317; *Harvey v Canada Life Assurance Co* (1911) 20 OWR 54; cf *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18.

4 *Fowler v Scottish Equitable Life Assurance Society and Ritchie* (1858) 28 LJCh 225; *Billington v Provincial Insurance Co* (1879) 3 SCR 182; see further MISTAKE.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(i) Classification of Conditions generally/93. Distinction between conditions and collateral terms.

(5) CONDITIONS OF THE POLICY

(i) Classification of Conditions generally

93. Distinction between conditions and collateral terms.

A breach of the terms of a contract of insurance by a party to that contract will give the other party a right of action in damages for any loss sustained as a result of the breach¹. However, a distinction exists between

- 61 (1) stipulations in such a contract which amount merely to collateral promises on the part of the insured, so that his failure to fulfil them will not entitle the insurers to repudiate liability under the contract or to resist a claim by the insured under it², although it may entitle them to recover damages³; and
- 62 (2) stipulations amounting to warranties⁴ or conditions⁵ the observance of which is fundamental to the existence of liability under the contract on the part of the insurers or to the enforcing of a claim under the contract by the insured⁶.

1 See eg *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798 at 813, CA. As to the measure of damages in contract see DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

2 For stipulations which have been held to be collateral see eg *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA (workmen's compensation; stipulation as to keeping wages book); *Stoneham v Ocean Railway and General Accident Insurance Co* (1887) 19 QBD 237 (stipulation as to giving notice of accident; stipulation not expressed to be a condition precedent); *W & J Lane v Spratt* [1970] 2 QB 480, [1970] 1 All ER 162; and PARA 170 post.

3 But in practice this remedy affords them little or no protection: *HTV Ltd v Lintner* [1984] 2 Lloyd's Rep 125 at 128 per Neill J.

4 For the meaning of 'warranty' see PARA 94 post.

5 For the different classes of conditions and their effect see PARA 95 et seq post.

6 See *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 915-916, HL, per Lord Blackburn. Even, however, in the case of a term which is fundamental to the contract or to the making of a claim under it, the insurers have the option of treating the contract as subsisting or the claim as validly made, as the case may be, and counterclaiming in damages: cf CONTRACT vol 9(1) (Reissue) PARA 989 et seq. As to which terms of a contract are fundamental see PARAS 100-106 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(i) Classification of Conditions generally/94. Meaning of 'warranty'.

94. Meaning of 'warranty'.

In most branches of the law of contract, other than insurance law, 'warranty', as distinct from 'condition', is used to describe a provision which is subsidiary or collateral to the main purpose of the contract¹. However, in relation to insurance 'warranty' is used where the insured undertakes that some particular thing shall or shall not be done or that a particular fact does or does not exist², in such circumstances that the undertaking constitutes a fundamental term of the contract so as to confer, in the event of a breach, a right on the insurers' part to repudiate the contract altogether³. A warranty must be strictly and literally observed and any breach, even though immaterial to the risk or loss, is sufficient to terminate the contract⁴. The contrast between a condition and a warranty in insurance law, so far as any distinction exists⁵, is the distinction between a term which is fundamental to the validity of the contract or the making of a claim under it⁶, but which is one of the ordinary terms of the contract, and a term which, by reason of being specifically superadded to the ordinary terms, has importance as a fundamental stipulation of the contract. This use of the word is more frequently met with in marine⁷ than in non-marine insurance, but the basic principle is the same. If, therefore, in a proposal a proposer signs a form of declaration by which he warrants the truth of the answers he has given, it means that, as a superadded obligation of paramount importance, he accepts that the truth of his answers is fundamental to the whole contract⁸.

1 As to conditions and warranties generally see CONTRACT vol 9(1) (Reissue) PARAS 993-994.

2 See the Marine Insurance Act 1906 s 33(1) (definition of 'warranty' for the purposes of marine insurance). The warranty can be express or implied: s 33(2); and see PARA 235 post.

3 *Pawson v Watson* (1778) 2 Cowp 785; *Barnard v Faber* [1893] 1 QB 340, CA; *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA; *HIH Casualty & General Insurance Co Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] All ER (Comm) 39, [2001] 2 Lloyd's Rep 161. Cf *Kumar v AGF Insurance Ltd* [1998] 4 All ER 788, [1999] 1 WLR 1747, where the terms of the policy prevented the insurer from avoiding the contract. It is settled that the decision in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233, [1991] 3 All ER 1, HL (see PARA 236 post) applies to all insurance contracts and, therefore, discharge from liability is automatic: *CNA International Reinsurance Co Ltd v Companhia De Seguros Tranquilidade SA* [1999] Lloyd's Rep 289; *Bhopal v Sphere Drake Insurance plc* [2002] Lloyd's Rep IR 413, CA; *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA Civ 1253, [2002] 2 All ER (Comm) 1053, [2003] Lloyd's Rep IR 1; *Bennett (t/a Soho Pizzeria) v Axa Insurance plc* [2003] EWHC 86 (Comm).

4 *Pawson v Watson* (1778) 2 Cowp 785; *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL.

5 See *W & J Lane v Spratt* [1970] 2 QB 480 at 486-487, [1970] 1 All ER 162 at 166-167 per Roskill J; *Provincial Insurance Co v Morgan and Foxon* [1933] AC 240 at 253-254, HL, per Lord Wright.

6 As to the different types of condition which may exist and the effect of breach in the case of each type see PARAS 95-99 post.

7 As to warranties in marine insurance see PARA 235 et seq post.

8 As to declarations warranting the proposal see PARA 62 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(ii) Types of Conditions/95. Conditions relating to the risk.

(ii) Types of Conditions

95. Conditions relating to the risk.

The first type of condition in a policy, which is in practice often superadded as a warranty¹, is a condition describing, prescribing, circumscribing or otherwise defining the terms of the risk proposed or accepted for insurance. Conditions of this type are in the strictest sense conditions of the policy in that the insurers are never on risk at all unless and until the condition is question is fulfilled, and cease to be on risk if and when the condition ceases to be fulfilled². However, there is an important distinction according to whether the condition is descriptive or promissory³. If it is merely descriptive, in the sense that the proposer states that he wants cover if and in so far as the condition is fulfilled, the insurers cannot repudiate the policy merely because, at the time when loss occurs, the condition is not fulfilled; they can merely assert that, in relation to that loss, the policy is not operative⁴. However, if the condition is promissory, in the sense that the proposer stipulates that a certain state of affairs will never be departed from, the insurers are entitled on breach to set aside the whole contract on the ground that the basic stipulation governing their acceptance of the contract has been broken⁵. Conditions of this kind are of particular importance in relation to matters affecting the delimitation of the risk⁶.

1 For the meaning of 'warranty' see PARA 94 ante.

2 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

3 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL; *Beauchamp v National Mutual Indemnity Insurance Co Ltd* [1937] 3 All ER 19 (as to which see PARA 120 note 4 post).

4 *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669; *Roberts v Anglo-Saxon Insurance Association* (1927) 96 LJKB 590; *Bright v Ashfold* [1932] 2 KB 153; *Gray v Blackmore* [1934] 1 KB 95.

5 *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 249, HL, per Lord Russell of Killowen; *Beauchamp v National Mutual Indemnity Insurance Co Ltd* [1937] 3 All ER 19.

6 As to matters affecting the risk see PARA 119 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(ii) Types of Conditions/96. Conditions precedent to liability under the policy.

96. Conditions precedent to liability under the policy.

The second type of condition is usually described as a condition precedent¹ of the policy, that is to say a term going to the root of the contract in relation to its validity in origin². Whether a term is of this type may depend on the ruling given by the court as to whether, taking the contract as a whole, the term in question was fundamental to the whole contract, but the same result can be achieved if the parties have agreed that a term, otherwise less than a fundamental term, is to be deemed to be a condition precedent to the contract³. If the condition precedent is not fulfilled the contract will be void from the outset⁴. There is no obligation on the insurer to relate a condition to a particular aspect of the policy⁵. The language of the policy is not conclusive; it may describe as a condition precedent something which, of its very nature, is something to be done after the contract is made⁶. However, great force is given to the language which the parties themselves have chosen to adopt⁷. It is generally made a condition precedent to the validity of the policy that all statements made in the proposal or otherwise during the negotiations are to be true⁸.

1 As to conditions precedent in contracts generally see CONTRACT vol 9(1) (Reissue) PARA 962 et seq.

2 *Barnard v Faber* [1893] 1 QB 340 at 344, CA, per Bowen LJ.

3 *Thomson v Weems* (1884) 9 App Cas 671 at 683, HL, per Lord Blackburn; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 885-886, CA, per Fletcher Moulton LJ; see also *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255 at 262, HL, per Lord Eldon LC; *Barnard v Faber* [1893] 1 QB 340, CA; *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, CA; *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd* [2001] EWCA Civ 1964, [2001] 1 All ER (Comm) 366, [2002] Lloyd's Rep IR 178; *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2003] All ER (D) 199 (Feb).

4 *Thomson v Weems* (1884) 9 App Cas 671, HL; *Armstrong v Turquand* (1858) 9 ICLR 32 at 42 per Christian J; *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587, PC.

5 *New India Assurance Co Ltd v Yeo Beng Chow* [1972] 3 All ER 293, [1972] 1 WLR 786, PC.

6 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA; *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, CA; *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd* [2001] EWCA Civ 1964, [2001] 1 All ER (Comm) 366, [2002] Lloyd's Rep IR 178.

7 Cf the text and note 3 supra. As to the intention of the parties as a test of the meaning of the contract see *Wheulton v Hardisty* (1857) 8 E & B 232; and PARA 86 ante.

8 As to contractual provisions as to non-disclosure and misrepresentation see PARAS 51-53 ante. It is for the insurer to elect whether to avoid liability under the contract or to treat it as subsisting; cf CONTRACT vol 9(1) (Reissue) PARA 991. In matters relating to insurance the word 'void' is often loosely used as meaning only that the insurers are entitled to repudiate all liability under the contract: see *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587 at 596, PC; see also *Doe d Pitt v Laming* (1814) 4 Camp 73 at 75; and PARA 55 ante.

UPDATE

96 Conditions precedent to liability under the policy

NOTE 8--See *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All ER (Comm) 14.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(ii) Types of Conditions/97. Conditions subsequent affecting the policy.

97. Conditions subsequent affecting the policy.

A condition subsequent affecting the policy is a condition relative in its essence to duties arising after the policy is in operation, which by necessary intention or express agreement affects the continued validity of the policy so that, if there is a breach, the other party may treat the policy as at an end¹. It may be stipulated as a condition of the policy that the insured must not insure elsewhere; if he does, the insurers may avoid the policy². The avoidance of the policy in such a case can only date from the breach³; up to that date the policy is fully effective so as to entitle the insured to recover in respect of any loss which occurred before the breach⁴.

1 *Glen v Lewis* (1853) 8 Exch 607; *Farnham v Royal Insurance Co Ltd* [1976] 2 Lloyd's Rep 437; *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2003] All ER (D) 199 (Feb).

2 *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC. For conditions as to 'other insurances' see PARA 207 post.

3 *Glen v Lewis* (1853) 8 Exch 607; *Sun and Fire Office v Hart* (1889) 14 App Cas 98, PC; *Sulphite Pulp Co v Faber* (1895) 1 Com Cas 146; *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC; *Marcovitch v Liverpool Victoria Friendly Society* (1912) 28 TLR 188; *Kazakhstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [1999] 2 All ER (Comm) 445 (affd [2000] 1 All ER (Comm) 708, [2000] Lloyd's Rep IR 371, CA).

4 *Daff v Midland Colliery Owners' Mutual Indemnity Co* (1913) 82 LJB 1340, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(ii) Types of Conditions/98. Conditions subsequent affecting recovery.

98. Conditions subsequent affecting recovery.

A condition subsequent affecting recovery under a policy is a condition dealing with the situation where a claim has arisen, or is alleged to have arisen, and prescribing the duties which have to be fulfilled if the claim is to be enforced¹. A condition of this kind has to be performed before a claim can be maintained or before the enforcement of a claim in a particular manner can be obtained². It may be stipulated that a claim is not enforceable unless the insured has furnished the insurers with all such proofs and information with respect to the claim as may be reasonably required; if the insured refuses to furnish such information the claim becomes unenforceable then or at any time afterwards³. If the true construction of the stipulation is that the claim may not be enforced until the stipulated information is given, the court would be bound to hold that pending the giving of the information the claim is premature⁴. It may be provided that it is to be a condition precedent to the enforcement of a claim in the courts that there has been a reference to, and an award by, an arbitrator; the court is then bound to rule that proceedings are premature if there has been no such reference or award⁵. It may be made a condition that no admission of liability be made or offer or promise of payment be made without the written consent of the insurers⁶; or it may be stated that if the insurers disclaim liability to the insured, he must institute legal proceedings against them within a specified period of the date of the disclaimer⁷. Unless there is some stipulation to the contrary⁸, breach of a condition of this kind only affects the claim in question⁹; if a second claim arises during the currency of the policy the enforceability of the second claim will not be affected merely because conditions affecting the first claim have not been fulfilled, provided that the insured fulfils the conditions applicable to the second claim¹⁰. However, a condition may be so framed that, even though it relates to the making of a claim, failure to observe the requirement imposed by it will affect the continued validity of the policy¹¹. Breach of a condition which relates to the recoverability of a claim but which is not expressed as one which has to be fulfilled before any claim can be made, will deprive the assured of the right to recover only if the breach is a serious one, in that it has caused serious prejudice to the insurers. If there are no serious consequences, the insurers will have to pay the claim and will have at best a right to claim damages from the insured for any loss which they may have suffered by reason of his breach¹².

1 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL.

2 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 915, 917, HL, per Lord Blackburn, and at 918 per Lord Watson; *Kerridge v Rush* [1952] 2 Lloyd's Rep 305; *London Crystal Window Cleaning Co Ltd v National Mutual Indemnity Insurance Co Ltd* [1952] 2 Lloyd's Rep 360; *Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972, [1966] 1 WLR 1334, CA; *Farrell v Federated Employers Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA (condition that all writs be notified to the insurers immediately on receipt); *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, CA (delivery of claim within 30 days); *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd* [2001] EWCA Civ 1964, [2001] 1 All ER (Comm) 366, [2002] Lloyd's Rep IR 178 (notification to insurer of occurrences 'as soon as possible'); *Cornhill Insurance plc v D E Stamp Felt Roofing Contractors Ltd* [2002] EWCA Civ 395, [2002] All ER (D) 245 (Mar).

3 *Welch v Royal Exchange Assurance* [1939] 1 KB 294 at 312, [1938] 4 All ER 289 at 295, CA, per MacKinnon LJ, and at 314-315 and 297 per Finlay LJ (information as to banking accounts used for purposes of insured's business; information refused prior to, but given during, arbitration proceedings).

4 *Welch v Royal Exchange Assurance* [1939] 1 KB 294 at 307-308, [1938] 4 All ER 289 at 292, CA, per Slessor LJ.

5 *Scott v Avery* (1856) 5 HL Cas 811; and see PARA 188 post. The principle stated in the text is subject to the provisions of the Arbitration Act 1996 s 9(4), (5): see PARA 188 post. See also ARBITRATION vol 2 (2008) PARA 1222.

6 *Terry v Trafalgar Union Insurance Co Ltd* [1970] 1 Lloyd's Rep 524.

7 *Walker v Pennine Insurance Co Ltd* [1980] 2 Lloyd's Rep 156, CA.

8 See eg *Lek v Mathews* (1927) 29 Ll L Rep 141: text and note 11 infra.

9 *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793 at 806, CA, per Tomlin J.

10 *Reid & Co v Employers' Accidents etc Insurance Co* (1899) 1 F 1031, Ct of Sess.

11 *Lek v Mathews* (1927) 29 Ll L Rep 141 (policy to become void in event of false or fraudulent claim). As to conditions subsequent affecting the continued validity of the policy see PARA 97 ante.

12 *Figre Ltd v Mander* [1999] Lloyd's Rep IR 193; *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, CA; *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563; *LEC (Liverpool) Ltd v Glover (t/a Rainhill Forge)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep 563, [2001] Lloyd's Rep IR 315; *Glencore International AG v Ryan ('The Beursgracht')* [2001] EWCA Civ 2051, [2002] 1 Lloyd's Rep 574, [2002] Lloyd's Rep IR 335.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(ii) Types of Conditions/99. Exceptions framed as conditions.

99. Exceptions framed as conditions.

A further type of condition exists as a means to avoid overloading the operative words of a policy by the insertion of too many qualifications, riders and provisos. It is convenient when framing the policy to resort to the device of inserting among the conditions of the policy a number of common form exceptions¹. The stipulation in question is then merely another example of the first type of condition, namely a definition of the risk², although it is effected by means of a limitation on the scope of the insurance³. If a provision is framed as an exception, it will normally be construed as being in every sense an exception; in particular, the onus of proving that a claim is within the exception, so as to be excluded from the general effect of the operative words, will be on the insurers⁴. The insurers may seek to frame the exception in such a way as to require the insured to prove that the loss does not fall within the exception⁵. As a rule, the general operative words will be treated as prevailing in the absence of concrete proof by the insurers that the provision described as an exception is applicable⁶.

1 As to such common form exceptions see further PARAS 531, 582-583, 595-602, 647, 665 post.

2 As to conditions relating to the risk see PARA 95 ante.

3 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 274, CA, per Duke LJ; *Lake v Simmons* [1927] AC 487 at 507, HL, per Lord Sumner; see also *Cornish v Accident Insurance Co* (1889) 23 QBD 453, CA; *GFP Units Ltd v Monksfield* [1972] 2 Lloyd's Rep 79 (limitation to named drivers); *Kennedy v Smith and Ansvar Insurance Co Ltd* 1976 SLT 110, Ct of Sess (insured not covered when driving 'under the influence of alcohol'). An exception may be inserted to make it clear that a loss, which is not in fact covered by the policy, is excluded: *Borradaile v Hunter* (1843) 5 Man & G 639 at 658 per Erskine J.

4 *Motor Union Insurance Co Ltd v Boggan* (1923) 130 LT 588 at 590, HL, per Lord Birkenhead LC; see also *Smith v Accident Insurance Co* (1870) LR 5 Exch 302; *McSteen v McCarthy* [1952] NI 33. If the exception depends on something happening 'to the knowledge' of the insured, actual knowledge must be proved; failure to make inquiries which would have revealed the position is not sufficient: *John T Ellis Ltd v Hinds* [1947] KB 475, [1947] 1 All ER 337, DC.

5 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 272, CA, per Scrutton LJ; *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476.

6 *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476.

UPDATE

99 Exceptions framed as conditions

NOTE 6--See *KR v Royal and Sun Alliance plc* [2006] EWCA Civ 1454, [2007] 1 All ER (Comm) 161.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/100. Determination of fundamental terms.

(iii) Identification of Fundamental Terms

100. Determination of fundamental terms.

No distinction can be drawn in a contract of insurance by reference to the ordinary vocabulary of conditions and warranties used in other branches of the law of contract between a term which is fundamental¹ and a term which is not².

Whether a term is fundamental or not depends on the construction of the words used in the context as part of the contract as a whole³. It is not necessary that any particular form of words is used in this context⁴ but resort must be made to the general principles of interpretation⁵.

1 le fundamental to the existence of the contract as a contract imposing liability on the insurers or to the making of a claim under the contract. As to the distinction between conditions and collateral terms in insurance law see PARA 93 ante.

2 As to warranties as fundamental terms of a contract of insurance see PARA 94 ante.

3 *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 507 per Lord St Leonards, followed in *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL, per Lord Blackburn; *Wheelton v Hardisty* (1858) 8 E & B 232, Ex Ch, following *Stokes v Cox* (1856) 1 H & N 533, Ex Ch; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 250, HL, per Lord Wright.

4 *Weir v Northern Counties of England Insurance Co* (1879) 4 LR Ir 689 at 692 per Lawson J.

5 As to the general principles of interpretation see PARAS 83-89 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/101. Intention of the parties.

101. Intention of the parties.

The ultimate test of what is a fundamental term in an insurance contract is whether it is the intention of the parties, as indicated by the language they have used, to make the stipulation a fundamental term. Emphasis is particularly laid on the intention of the insured¹, derived from the agreement, in the sense that it must be quite clear that from his point of view he agreed to the stipulation being a fundamental term². If there is ambiguity in the language of the term in question, coming as it normally does from the pen of the insurers' draftsman³, it will not be construed as a fundamental term⁴. If the draftsman has framed the term as an exception, the rule is stringently applied⁵.

1 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 886, CA, per Fletcher Moulton LJ; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 431, CA, per Farwell LJ.

2 *Baxendale v Harvey* (1859) 4 H & N 445 at 451 per Pollock CB; *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 at 799 per Blackburn J; *Thomson v Weems* (1884) 9 App Cas 671, HL.

3 As to the form of the policy see PARA 86 text to notes 6-8 ante. As to the contra proferentem rule see PARA 87 ante.

4 *Cowell v Yorkshire Provident Life Assurance Co* (1901) 17 TLR 452; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, CA; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA; *Simmonds v Cockell* [1920] 1 KB 843 at 845 per Roche J.

5 *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456, CA, per Lindley LJ. If, however, the exception is not ambiguous, full effect will be given to it: *Re United London and Scottish Insurance Co, Brown's Claim* [1915] 2 Ch 167, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/102. Nature of the subject matter.

102. Nature of the subject matter.

The nature of the subject matter of an insurance contract is significant when deciding whether a term is fundamental or not¹. In this regard it may be apparent that a fundamental stipulation must have been intended, whatever the particular form of words which may have been adopted². Thus, if the subject matter is one which obviously goes to the root of the contract³ or affects the continuance of the policy as a valid contract⁴, fundamental consequences must have been intended in the event of a breach⁵. Such stipulations are many and various: examples are stipulations in fire policies prohibiting the insured from keeping dangerous goods in the premises insured⁶, stipulations in life policies against suicide⁷, stipulations in any policies correlating the premium to that chargeable under other policies⁸ and stipulations in any policies defining, controlling or circumscribing the risk⁹.

1 *Barnard v Faber* [1893] 1 QB 340 at 344, CA, per Bowen LJ.

2 *Wheelton v Hardisty* (1858) 8 E & B 232 at 300, Ex Ch, per Bramwell B; *Worsley v Wood* (1796) 6 Term Rep 710, followed in *London Guarantie Co v Fearnley* (1880) 5 App Cas 911, HL.

3 *Barnard v Faber* [1893] 1 QB 340 at 343, CA, per Bowen LJ; *Bancroft v Heath* (1901) 6 Com Cas 137, CA; *Homes v Scottish Legal Life Assurance Society* (1932) 48 TLR 306.

4 *Barnard v Faber* [1893] 1 QB 340 at 343, CA.

5 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 915, HL, per Lord Blackburn; *Barnard v Faber* [1893] 1 QB 340 at 342, CA, per Lindley LJ.

6 *Dobson v Sotheby* (1827) Mood & M 90.

7 *Ellinger & Co v Mutual Life Insurance Co of New York* [1905] 1 KB 31, CA; see PARAS 530-531 post.

8 *Barnard v Faber* [1893] 1 QB 340, CA.

9 *Barnard v Faber* [1893] 1 QB 340, CA; *Ellinger & Co v Mutual Life Insurance Co of New York* [1905] 1 KB 31, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/103. Express words.

103. Express words.

Just as the subject matter, by necessary implication, can be decisive of the question as to what is a fundamental term in a contract of insurance, so too can the express words be vital in so far as they demonstrate the parties' express intention¹. On its face, a stipulation may relate to something of collateral or secondary importance compared to the fundamental objects of the contract; for example, like an arbitration clause², it may merely regulate the manner in which rights under the contract are to be worked out³. However, the intention to make such a stipulation a fundamental term may be demonstrated by the use of appropriate language in the contract. The most stringent form of language for this purpose is where it is stated that performance of the term in question is the basis⁴ or essence⁵ of the contract, or that the stipulation is a condition precedent⁶. A less stringent form is where the term is described as a condition⁷, warranty⁸ or proviso⁹, or where it is stipulated that a breach is to disentitle the insured from enforcing the contract¹⁰. If the language is adequate, on proving a breach, the insurers will be entitled to repudiate the contract as a whole, even though by itself and without express provision as to the consequences of breach the stipulation in question would not be regarded as fundamental to the contract as a whole¹¹.

1 *Wheelton v Hardisty* (1858) 8 E & B 232 at 297, Ex Ch, per Martin B. As to the nature of the subject matter as a test see PARA 102 ante.

2 As to arbitration clauses see PARAS 185-188 post.

3 *Lancashire Insurance Co v IRC* [1899] 1 QB 353 at 359 per Bruce J.

4 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA (affd [1927] AC 139, HL); *Bell v Lever Bros* [1932] AC 161 at 225, HL, per Lord Atkin. See further PARA 62 ante.

5 *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 498 per Parke B; *Roper v Lendon* (1859) 1 E & E 825 at 829 per Lord Campbell CJ; *Elliott v Royal Exchange Assurance Co* (1867) LR 2 Exch 237 at 246 per Bramwell B; *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 51 WR 222.

6 *Caledonian Insurance Co v Gilmour* [1893] AC 85, HL.

7 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 919, HL, per Lord Watson. Merely calling a stipulation a condition will not, however, make it one if, on its true interpretation, it is not a condition; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA.

8 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255 at 262, HL, per Lord Eldon LC; *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 504 per Lord Cranworth; *Barnard v Faber* [1893] 1 QB 340, CA; *Palatine Insurance Co v Gregory* [1926] AC 90 at 93, PC; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL. But even where the word 'warranty' is used, the court may construe the term as one which merely delimits the risk: *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp plc* [1989] 1 Lloyd's Rep 299 (burglary insurance).

9 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911, HL; *Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd* (1885) 1 TLR 495.

10 *Mason v Harvey* (1853) 8 Exch 819; *Sulphite Pulp Co v Faber* (1895) 1 Com Cas 146.

11 *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA (where in the circumstances the stipulation was held inapplicable).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/104. Stipulation to be looked at as a whole.

104. Stipulation to be looked at as a whole.

In determining whether a stipulation is fundamental to a contract the stipulation must be taken as a whole. If a substantial part of it falls within this category, the rest will belong prima facie to the same category. For example, if a stipulation requiring delivery of detailed particulars within a specified time is fundamental, the subsidiary requirement as to the time for delivery is also fundamental¹. Conversely, if the main part of a stipulation is not in substance fundamental, other portions of it will not normally be presumed to be fundamental². It may, however, be clear, as a matter of construction, that a number of entirely separate and independent stipulations are, either as a matter of drafting convenience or for other reasons, collected together so as to form in appearance a single corporate clause or provision of the policy; in such a case each stipulation ought to be looked at separately and given its value accordingly, even if the result is to make one sentence a fundamental provision, when all the others plainly are not³.

1 *Roper v Lendon* (1859) 1 E & E 825.

2 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA.

3 *Roper v Lendon* (1859) 1 E & E 825.

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105. Language not conclusive.

The language of an insurance policy is by no means conclusive in determining whether a stipulation is fundamental. For example, it is not unusual to find the word 'conditions' as a general heading to a considerable number of stipulations which, although grouped together under the single heading, vary greatly in scope and importance. From their very nature, some may be quite obviously of a fundamental and primary nature, while others may equally obviously be of merely collateral and secondary importance¹. On examination, others may well turn out to be incapable of operating as fundamental conditions, in the true sense of the term². They may also vary in phrasing, the language in some cases indicating that they are designed as fundamental terms and in other cases pointing neither one way nor the other³. Sometimes it is provided that all stipulations grouped under a particular heading are to be regarded as fundamental, but the inclusion of a particular stipulation under that heading will not necessarily by itself be conclusive⁴. Provided that the stipulation is capable of being construed as fundamental, the test whether it should be so construed is the intention of the parties as gathered from the contract⁵. Where, however, a stipulation is one which cannot be performed until the policy itself has expired⁶ or after payment has been made by the insurers under the policy because it relates solely to the insurers' subrogation rights⁷, then from its very nature the stipulation cannot be fundamental⁸.

1 *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA.

2 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911, HL; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA.

3 *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237 at 241; *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798 at 813, CA.

4 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 916-917, HL; *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA.

5 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 917, HL.

6 *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 919, HL (duty to assist insurers in enforcing subrogated rights).

7 *General Accident Assurance Corp v Day* (1904) 21 TLR 88 (statement of wages paid during period of insurance for adjustment of premium); *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA. As to the insurers' subrogation rights see PARA 195 et seq post.

8 If, however, the policy stipulates that any money paid under it is to be recoverable where there is a breach by the insured of such a stipulation it seems that a claim for recovery will lie if the breach is proved.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/ (iii) Identification of Fundamental Terms/106. Unreasonable conditions.

106. Unreasonable conditions.

It has been suggested that a stipulation in a policy may be so capricious or unreasonable as to be unenforceable as a fundamental term of the contract¹. It is difficult to reconcile this view with the basic English concept of freedom of contract², but contract terms may be unfair in contracts concluded between an insurer and a consumer³.

However, a condition in an insurance policy which is contrary to public policy is unenforceable, for example a condition by which the insurers impliedly undertake to pay the insured's personal representatives if the insured under a life policy kills himself while not mentally disordered⁴. On the other hand a stipulation in a life policy that the insured will not voluntarily engage in military service is not contrary to public policy as being a deterrent against performing a national duty⁵. Where a stipulation is not merely unreasonable but impossible, in the sense that from the outset it never could be performed, it is a nullity which is simply disregarded⁶.

1 *Doe d Pitt v Laming* (1814) 4 Camp 73 at 75 per Lord Ellenborough CJ; *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 919, HL, per Lord Watson; *Sun Fire Office v Hart* (1889) 14 App Cas 98, PC; *Home Insurance Co of New York v Victoria-Montreal Fire Insurance Co* [1907] AC 59 at 64, PC; *Daff v Midland Colliery Owners' Mutual Indemnity Co* (1913) 6 BWCC 799 at 823, HL, per Lord Moulton.

2 *Wilkinson v Car and General Insurance Corp Ltd* (1913) 110 LT 468 at 472 per Lord Reading CJ; *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669 at 673, CA, per Bankes LJ; see also *Gamble v Accident Assurance Co* (1869) IR 4 CL 204 at 214 per Pigot CB. See generally CONTRACT.

3 Ie by virtue of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see PARA 91 ante. 'Consumer' means any natural person who is acting for purposes which are outside his trade, business or profession: reg 3(1).

4 *Beresford v Royal Insurance Co Ltd* [1939] AC 586, [1938] 2 All ER 602, HL.

5 *Duckworth v Scottish Widows' Fund Life Assurance Society* (1917) 33 TLR 430.

6 As to conditions which cannot be performed see PARA 109 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(iv) Performance of Conditions/107. Obligation of insured as regards performance.

(iv) Performance of Conditions

107. Obligation of insured as regards performance.

The fulfilment of a condition is a contractual term binding on the insured, and in the event of non-fulfilment he is the person who suffers by being unable to recover under the policy. Any person claiming through him is in the same position¹, although sometimes there is a special saving of the rights of assignees in good faith for value². The condition may stipulate for performance of some act by the insured personally³ but, unless it is so stipulated, it is immaterial how or by whom performance is effected; it may be by an agent⁴, a trustee in bankruptcy⁵, a personal representative⁶ or a complete stranger⁷.

1 *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186, CA; *Cawley v National Employers' Accident and General Assurance Association Ltd* (1885) 1 TLR 255.

2 *Jackson v Forster* (1860) 1 E & E 470, Ex Ch; *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; and see PARA 547 post.

3 *Want v Blunt* (1810) 12 East 183; *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257; *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622; *Duncan Logan (Contractors) Ltd v Royal Exchange Assurance Group* 1973 SLT 192, Ct of Sess.

4 *Patton v Employers' Liability Assurance Corpn* (1887) 20 LR Ir 93.

5 *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186, CA.

6 *Cawley v National Employers' Accident and General Assurance Association Ltd* (1885) 1 TLR 255; cf *Verelst's Administratrix v Motor Union Insurance Co Ltd* [1925] 2 KB 137.

7 *Patton v Employers' Liability Assurance Corpn* (1887) 20 LR Ir 93 at 100 per Murphy J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(iv) Performance of Conditions/108. What amounts to performance.

108. What amounts to performance.

The nature and extent of the performance required depends on the true construction of the requirement in question. If a condition is framed in general terms, performance is adequate if it covers the substance of the matter¹; but, if the condition goes into details, performance must be strictly in accordance with the details required² and, however burdensome or immaterial they may appear to be, they cannot be disregarded³. However, it is sufficient in such a case if the precise letter of the condition is performed in the most literal sense; the insurers cannot require the insured to go beyond the precise terms of the condition or complain that a literal performance does not protect them adequately⁴.

1 *Mason v Harvey* (1853) 8 Exch 819 at 821 per Pollock CB.

2 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 254, HL, per Lord Wright.

3 *Want v Blunt* (1810) 12 East 183; *Roper v Lendon* (1859) 1 E & E 825.

4 *Whitehead v Price* (1835) 2 Cr M & R 447, followed in *Mayall v Mitford* (1837) 6 Ad & El 670; *Ward v Law Property Assurance and Trust Society* (1856) 4 WR 605; *National Protector Fire Insurance Co Ltd v Nivert* [1913] AC 507, PC; *Re Birkbeck Permanent Benefit Building Society, Official Receiver v Licences Insurance Corpn* [1913] 2 Ch 34; *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(iv) Performance of Conditions/109. Conditions which cannot be performed.

109. Conditions which cannot be performed.

If a condition, from its very nature, is such that it was never capable of being performed at all, it is a nullity and performance of it cannot be required¹. It is different where there is no inherent impossibility in the condition itself, but events as they actually turn out produce an impossibility in fact. For example, where notice of an injury or a death has to be given within a specified time and the insured or claimant is ignorant throughout the specified time of the fact of the injury or death, he has nonetheless failed to do what the contract required him to do². Similarly it is no excuse when an executor does not know that he has been appointed³, has not perfected his title⁴, does not know of the existence of the policy or cannot find it so as to apprise himself of its terms⁵. In these cases, however, the decisions have to some extent been put on the ground of the negligence of the insured in failing to keep his family or friends adequately informed about his affairs⁶. On the other hand, if the insurers have not yet issued the policy, so that no one has an opportunity of knowing about the existence or scope of such a condition, they cannot rely on it⁷. If the policy stipulates for some action on the part of a third person, such as issuing a certificate vouching for the good faith of the insured or of his claim, it is no excuse for the insured that the third person fails, neglects or refuses to do what is required⁸.

1 *Worsley v Wood* (1796) 6 Term Rep 710 at 718 per Lord Kenyon CJ. It has been suggested that if the insured had no medical attention at the time he was killed, a condition requiring a report from his medical attendant is not broken by the absence of a report: *Patton v Employers' Liability Assurance Corp'n* (1887) 20 LR Ir 93 at 99 per Harrison J.

2 *Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd* (1885) 1 TLR 495; *Durrant v Maclaren* [1956] 2 Lloyd's Rep 70. The manifest hardship of this rule has produced a reluctance on the part of judges to construe such a provision as a condition; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237.

3 *Gamble v Accident Insurance Co* (1869) IR 4 CL 204.

4 *Patton v Employers' Liability Assurance Corp'n* (1887) 20 LR Ir 93.

5 *Gamble v Accident Insurance Co* (1869) IR 4 CL 204.

6 *Gamble v Accident Insurance Co* (1869) IR 4 CL 204 at 215.

7 *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA.

8 *Oldham v Bewicke* (1786) 2 Hy BI 577n; *Worsley v Wood* (1796) 6 Term Rep 710; but see also *Patton v Employers' Liability Assurance Corp'n* (1887) 20 LR Ir 93 at 99, and note 1 supra.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(iv) Performance of Conditions/110. What amounts to a breach.

110. What amounts to a breach.

In relation to breach, as in relation to performance, the decisive matter is what, on the true construction, the condition requires to be done or left undone. There is no breach unless the act done or left undone comes precisely within the language used¹. For example, if it is provided that the policy may be avoided in the event of an untrue statement being made in the proposal form, there cannot be a breach if there is, in fact, no proposal form². Conversely, where there is a failure to comply with what is required it is immaterial what the reason may be for the failure; whether the conduct of the insured is deliberate³, negligent⁴ or merely inadvertent⁵, the consequences are the same. Nor can ignorance, either of the existence of the condition or of its precise terms, be set up as an excuse unless the insurers' conduct can be made responsible for the ignorance, for example where they have not yet issued the policy⁶.

1 *Dobson v Sotheby* (1827) Mood & M 90, followed in *Shaw v Robberds* (1837) 6 Ad & El 75; *Stokes v Cox* (1856) 1 H & N 533; *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC; *Wilkinson v Car and General Insurance Corp* (1913) 110 LT 468; *Cornhill Insurance plc v D E Stamp Felt Roofing Contractors Ltd* [2002] EWCA Civ 395, [2002] All ER (D) 245 (Mar).

2 *Pearl Life Assurance Co v Johnson* [1909] 2 KB 288.

3 *Borradaile v Hunter* (1834) 5 Man & G 639.

4 *Gamble v Accident Insurance Co* (1869) IR 4 CL 204; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 884, CA, per Fletcher Moulton LJ.

5 *Cassel v Lancashire and Yorkshire Accident Insurance Co* (1885) 1 TLR 495; *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 51 WR 222.

6 *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(iv) Performance of Conditions/111. Onus of proof.

111. Onus of proof.

As a general principle, the onus is on the insurers to prove that a condition has been broken, not on the insured to prove compliance on his part with each and every stipulation¹. It may well be that, if there is a question as to whether a contract of insurance has ever come into existence or begun to be operative, the insured has to prove the happening of any events necessary to its existence or operation², but where the question is as to the insurers' liability under an admittedly effective policy, the rule as to the burden of proof is axiomatic in insurance law³. It is open to the parties to alter this result by making an express stipulation that the onus of proof is to be on the insured⁴, but very clear words are necessary to achieve such a result⁵.

1 *Barrett v Jermy* (1849) 3 Exch 535 at 542 per Parke B; *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433 at 438 per Viscount Reading CJ; *Bond Air Services Ltd v Hill* [1955] 2 QB 417 at 427, [1955] 2 All ER 476 at 479-480 per Lord Goddard CJ; *Nsubuga v Commercial Union Assurance Co plc* [1998] 2 Lloyd's Rep 682 (if the insurers allege fraud the standard of proof is to a 'very high balance of probabilities'); *Cornhill Insurance plc v D E Stamp Felt Roofing Contractors Ltd* [2002] EWCA Civ 395, [2002] All ER (D) 245 (Mar). The onus cannot be altered by a pleading which purports to put the insured to the proof of compliance with what has been required of him by a condition: *Bond Air Services Ltd v Hill* supra.

2 *Geach v Ingall* (1845) 14 M & W 95; *Ashby v Bates* (1846) 15 M & W 589, as explained in *Bond Air Services Ltd v Hill* [1955] 2 QB 417 at 427, [1955] 2 All ER 476 at 479-480 per Lord Goddard CJ.

3 *Bond Air Services Ltd v Hill* [1955] 2 QB 417 at 427, [1955] 2 All ER 476 at 480 per Lord Goddard CJ.

4 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 273, CA, per Scrutton LJ; *Levy v Assicurazioni Generali* [1940] AC 791, [1940] 3 All ER 427, PC; *Bond Air Services Ltd v Hill* [1955] 2 QB 417 at 428, [1955] 2 All ER 476 at 480 per Lord Goddard CJ.

5 *Bond Air Services Ltd v Hill* [1955] 2 QB 417 at 428, [1955] 2 All ER 476 at 480 per Lord Goddard CJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(v) Waiver in relation to Conditions/112. What constitutes a waiver.

(v) Waiver in relation to Conditions

112. What constitutes a waiver.

'Waiver' is a vague term used in many senses¹. However, in contract it is most commonly used to describe the process whereby one party unequivocally², but without consideration, grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived³.

Waiver may be express⁴ or implied from conduct, but in either case it must amount to an unambiguous representation arising as a result of a positive and intentional act (although waiver may not be the intended result⁵) done by the party granting the concession⁶ with the knowledge of all the material circumstances⁷. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance on the concession⁸. If what is relied on as a waiver is conduct after a breach has occurred, the conduct must be such as to indicate an intention to treat the contract as still subsisting⁹. Waiver by the insurers must be expressly pleaded by the insured¹⁰.

1 *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 70, HL, per Lord Wright; see also *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 1007-1008, [1972] 1 WLR 972 at 990, HL, per Lord Simon; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 397, HL, per Lord Goff of Chieveley. As to waiver of contractual rights generally see CONTRACT vol 9(1) (Reissue) PARAS 1025-1029.

2 *Ellis v Inner London Education Authority* (1978) Times, 7 November, EAT (employees reinstated subject to a disciplinary tribunal); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp'n of Liberia, The Laconia* [1977] 1 All ER 545, HL (late payment, not unequivocally accepted); *China National Foreign Trade Transportation Corp'n v Evlogia Shipping Co SA of Panama, The Mihalios Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, HL (retention of hire rent insufficiently unequivocal).

3 See *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 999, [1972] 1 WLR 972 at 980, HL, per Lord Hailsham of St Marylebone LC.

4 Express waiver by an agent is valid if within his authority: *Wing v Harvey* (1854) 5 De GM & G 265; cf *Acey v Fernie* (1840) 7 M & W 151. A policy may contain a provision dealing with waiver and, possibly, the manner in which an effective waiver can be made (*M'Millan v Accident Insurance Co* 1907 SC 484); such a provision is not usual because it can itself be waived by conduct and so cease to be of any operative effect (*Marcovitch v Liverpool Victoria Friendly Society* (1912) 28 TLR 188, CA). For the principles applicable to waiver clauses see *HIH Casualty and General Insurance Co v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

5 *Toronto Rly Co v National British and Irish Millers Insurance Co Ltd* (1914) 111 LT 555.

6 *Toronto Rly Co v National British and Irish Millers Insurance Co Ltd* (1914) 111 LT 555 at 563, CA, per Scrutton LJ; *Burridge & Son v F H Haines & Sons* (1918) 118 LT 681; *Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972, [1966] 1 WLR 1334, CA; *Allan Peters (Jewellers) Ltd v Brocks Alarms Ltd* [1968] 1 Lloyd's Rep 387; *Allen v Robles (Cie Parisienne de Garantie, third party)* [1969] 3 All ER 154, [1969] 1 WLR 1193, CA; *Farrell v Federated Employers' Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd and Kemp* [1980] 1 Lloyd's Rep 523 (burglary insurance); *Mint Security Ltd v Blair* [1982] 1 Lloyd's Rep 188 (cash in transit insurance); *Hadenfayre Ltd v British National Insurance Society Ltd* [1984] 2 Lloyd's Rep 393 (contingency insurance); *Callaghan & Hedges (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125; *Strive Shipping Corp'n v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88; *Moore*

Large & Co Ltd v Hermes Credit and Guarantee plc (sued as Credit Guarantee Insurance Co plc) [2003] EWHC 26 (Comm), [2003] 1 Lloyd's Rep 163.

7 *M'Entire v Sun Fire Office* (1895) 29 ILT 103. The insurers are entitled to a reasonable time in which to make up their minds: *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 50 TLR 528, CA. In the case of an agent, the knowledge must come to the minds of the persons whose duty it is to take action upon the knowledge: *Evans v Employers' Mutual Insurance Association Ltd* [1936] 1 KB 505, CA.

8 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, per Denning LJ; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340 at 350 per Diplock J; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL; *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 127, HL, per Lord Salmon; *Bremer Handelsgesellschaft mbH v C Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bremer Handelsgesellschaft mbH v Finagrain Compagnie Commerciale Agricole et Financière SA* [1981] 2 Lloyd's Rep 259 at 263, 266, CA; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep 45, CA; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL.

9 *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA; *Evans v Employers' Mutual Insurance Association Ltd* [1936] 1 KB 505, CA.

10 *Brook v Trafalgar Insurance Co Ltd* (1947) 79 Ll L Rep 365 at 367, CA, per Scott LJ (motor insurance).

UPDATE

112 What constitutes a waiver

NOTE 10--See *Charman v New Cap Reinsurance Corp Ltd (in liquidation)* [2003] EWCA Civ 1372, [2004] 1 All ER (Comm) 114.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(5) CONDITIONS OF THE POLICY/(v) Waiver in relation to Conditions/113. Estoppel distinguished from waiver.

113. Estoppel distinguished from waiver.

Estoppel takes place when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly. Once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced¹. Thus the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy estops him from averring that for that reason it is not a valid policy².

The two doctrines of waiver and estoppel seem to be becoming gradually more closely intertwined³ and the courts have sometimes explained waiver cases in terms of estoppel⁴ and in some cases seem to be considering the parallel application of both common law and estoppel⁵. The only difference of substance between it and waiver appears to be the requirement in the former that the representee has acted to his detriment in reliance on the representation⁶, but even this is no longer beyond doubt as a necessary requirement of estoppel⁷.

1 *Combe v Combe* [1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA per Denning LJ; *P v P* [1957] NZLR 854; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 324, [1960] 1 WLR 549 at 561 per Buckley J (affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA); *John Burrows Ltd v Subsurface Surveys Ltd and Whitcomb* (1968) 68 DLR (2d) 354. See also *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA Civ 1253, [2002] 2 All ER (Comm) 1053, [2003] Lloyd's Rep IR 1, where the point is made that there can be no waiver of a breach of warranty, as the risk is automatically terminated, and that the insurers can lose their rights only by means of estoppel. As to estoppel generally see ESTOPPEL; see also CONTRACT vol 9(1) (Reissue) PARAS 1030-1035.

2 *Wing v Harvey* (1854) 5 De GM & G 265 (breach of residence condition in life policy); *Edwards v Aberayron Mutual Ship Insurance Society* (1876) 1 QBD 563, Ex Ch; *Jones v Bangor Mutual Shipping Insurance Society* (1889) 61 LT 727.

3 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 758, [1972] 2 All ER 271 at 282, HL per Lord Hailsham of St Marylebone LC.

4 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, per Denning LJ; explaining *Bruner v Moore* [1904] 1 Ch 305; *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA. Indeed, his Lordship stated that waiver is only an example of the same principle as promissory estoppel: *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 212, [1972] 2 All ER 127 at 139-140, CA, per Lord Denning MR.

5 See eg *Hartley v Hymans* [1920] 3 KB 475; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.

6 *Toronto Rly Co v National British and Irish Millers Insurance Co Ltd* (1914) 111 LT 555 at 563, CA.

7 See CONTRACT vol 9(1) (Reissue) PARA 1033.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(i) Risk in relation to the Peril Insured Against/114. Aspects of risk.

(6) THE RISK

(i) Risk in relation to the Peril Insured Against

114. Aspects of risk.

There are three broad topics to be considered in relation to the risk: (1) the risk in the sense of the contractual definition of the peril insured against¹; (2) the risk in the sense of the subject matter insured against the stipulated peril²; and (3) the risk in the sense of the circumstance in which the stipulated peril has to affect the insured, either in relation to a defined subject matter or in relation to his incurring a particular liability or loss³.

1 As to the nature of the peril see PARA 115 post.

2 In the case of personal insurance, the person whose life or health or earning capacity is insured is in a broad sense the subject matter of the insurance; in the case of property insurance, the property insured forms the subject matter. In the cases of liability and contingency insurance, there is no basic subject matter such as a specific individual or a particular article or class of property; in these cases the activities of the insured are, in effect, the subject matter of the insurance and it is therefore usual to find explicit questions asked in the proposal, the answers being incorporated in the policy, relating to the nature of the insured's proposed activities and the means by which and the locality in which they are intended to be carried on. The subject matter of insurance must be distinguished from the subject matter of the contract of insurance, which is money and money only: *Rayner v Preston* (1881) 18 ChD 1 at 9, CA. As to the description of subject matter see PARA 116 post.

3 As to circumstances affecting the risk see PARA 119 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(i) Risk in relation to the Peril Insured Against/115. Nature of the peril.

115. Nature of the peril.

The nature of the peril against which the insurance is effected is a matter of interpretation of the policy in the light of the circumstances in which it is effected¹. If a policy is effected against loss by fire, it may well be a question of interpretation whether this is operative only in the case of a fire accidentally caused, or whether the cover extends even to fires deliberately started by the insured in his own fireplace in which, unknown to him, or forgotten by him, valuable property such as currency notes have been hidden². Again, if a fire policy is effected on a house, it will be a question of interpretation whether this is merely operative to indemnify the insured against the loss of the house if it is destroyed or whether it is also effective to cover the contingency of a fire spreading from the house so as to involve the insured in legal liabilities to adjoining property owners³. Similarly, problems may arise as to the meaning of 'loss' in a goods policy; for example, if the owner of a car intending to part with the property in it sells it and accepts a worthless cheque as a consideration for its sale, he suffers a loss, not of the car, but of the proceeds of sale⁴, but if the owner merely parts with the possession of his car to a selling agent on a promise to sell it on his behalf to a particular buyer, and the agent sells it otherwise than in accordance with his promise and retains the proceeds and, after the owner has taken all reasonable steps to recover the car, recovery is still uncertain, the owner suffers a loss of the car⁵. Also, 'accident' in a liability policy in respect of a crane means an unlooked-for mishap or occurrence, such as the crane collapsing⁶. It has been held that in a policy against the cost of rewriting a lost manuscript, the cost of rewriting was not the peril insured against, but only a means of quantifying the loss⁷.

1 As to the interpretation of the policy see PARAS 83-89 ante.

2 *Harris v Poland* [1941] 1 KB 462, [1941] 1 All ER 204. As to the perils insured against in fire insurance see PARA 591 et seq post.

3 *Balfour v Barty-King* [1957] 1 QB 496, [1957] 1 All ER 156, CA, although it is not an insurance case, illustrates the circumstances in which such a question may arise.

4 *Eisinger v General Accident Fire and Life Assurance Corp'n Ltd* [1955] 2 All ER 897, [1955] 1 WLR 869; and see further PARA 659 post.

5 *Webster v General Accident Fire and Life Assurance Corp'n Ltd* [1953] 1 QB 520, [1953] 1 All ER 663; and see further PARA 659 post.

6 *Canadian Indemnity Co v Walkem Machinery and Equipment Ltd* [1975] 5 WWR 510, Can SC. As to the scope of liability insurance see PARAS 663-665 post.

7 *Frewin v Poland* [1968] 1 Lloyd's Rep 100, where the manuscript was not, in fact, rewritten.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(ii) Risk in relation to the Subject Matter Described/116. Description of subject matter.

(ii) Risk in relation to the Subject Matter Described

116. Description of subject matter.

In personal or property insurance a description of the subject matter, whether it is a human being, a chattel or a parcel of real property, is an essential element in the description of the risk because identification of the subject matter is fundamental to the policy¹. In these classes of insurance insurers do not undertake a general liability to the insured²; they only assume a liability as defined in respect of a subject matter coming within the terms of the policy. The insurance is, therefore, only operative in relation to a claim if the subject matter of the claim corresponds with the description which the policy contains, whether on its face or by reference to the incorporated documents or to the surrounding circumstances admissible as aids to its interpretation³.

1 As to the identification of terms which are fundamental see PARAS 100-106 ante.

2 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173 at 176 per Lush J.

3 *Watchorn v Langford* (1813) 3 Camp 422; *Hare v Barstow* (1844) 8 Jur 928; *Sillem v Thornton* (1854) 3 E & B 868, as explained in *Stokes v Cox* (1856) 1 H & N 533, Ex Ch; *Joel v Harvey* (1857) 5 WR 488; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243 at 248, CA, per Scrutton LJ; *Herman v Phoenix Assurance Co Ltd* (1924) 18 Ll L Rep 371, CA. As to the interpretation of policies see PARAS 83-89 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(ii) Risk in relation to the Subject Matter Described/117. General and specific descriptions.

117. General and specific descriptions.

Descriptions of the subject matter¹ are of two kinds: (1) general descriptions designed to indicate the subject matter by way of classification under headings broadly defined; and (2) specific descriptions designed to identify individual objects which are covered. If a general description is adopted, the insurance is on the class designated by the description, and any object belonging to the class and falling within the description is covered, it being a matter of interpretation in each case what is the ambit of the class and whether the object in question falls within that ambit². If a specific description is adopted, the insurance is limited to the specific object which is identified by the description³. The description of the property insured may be so specific as to apply only to property which was in existence at the commencement of the insurance, even though the property is of such a nature that in the ordinary course it will be, or may be, consumed or disposed of and replaced by other property of a like nature⁴.

1 As to description of the subject matter see PARA 116 ante.

2 *Joel v Harvey* (1857) 5 WR 488 at 489 per Crompton J; *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224 at 235 per Palles CB.

3 *Hare v Barstow* (1844) 8 Jur 928; *Grover and Grover Ltd v Mathews* (1910) as reported in 15 Com Cas 249; cf *Morrison and Mason v Scottish Employers' Liability and Accident Assurance Co* (1888) 16 R 212, Ct of Sess.

4 *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224 (hayricks); *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 146 LT 26, HL (car).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(ii) Risk in relation to the Subject Matter Described/118. Locality as part of description.

118. Locality as part of description.

The description of the subject matter often includes a description of the locality in which it is situated¹. In the case of a building, the risk of a loss being partial or total, and very often the risk of there being a loss at all, is largely affected by the locality. Where the locality is of the essence of the description, the policy will not apply unless, at the date of the policy and of the loss, the property insured is in the locality indicated².

1 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

2 *Grover and Grover Ltd v Mathews* (1910) as reported in 79 LJKB 1025 at 1030; *Allom v Property Insurance Co* (1911) Times, Finance, Commerce and Shipping section, 10 February. As to the adequacy of description required see PARA 121 post; as to the limitation of risk by reference to locality in burglary insurance see PARA 650 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(iii) Risk in relation to Circumstances affecting the Subject Matter or the Incidence of the Peril/119. Circumstances affecting the risk.

(iii) Risk in relation to Circumstances affecting the Subject Matter or the Incidence of the Peril

119. Circumstances affecting the risk.

Frequently the description of the subject matter is framed by reference to circumstances affecting it, for example where the description hinges on the trade or business carried on by the insured¹ or the purpose for which the subject matter is used². In the case of a building, for example, insurers may require details of its construction³ or use⁴ or indications of its surroundings⁵ or other material circumstances⁶. Matters of this kind do not normally affect the identity of the subject matter, but they are of importance as placing on record in the policy the description of the risk as given to the insurers at the date of the insurance⁷. The insurers' acceptance of the proposal is on the basis of the description of the risk given to them, not on their own knowledge of it⁸.

1 *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Hales v Reliance Fire and Accident Insurance Corp Ltd* [1960] 2 Lloyd's Rep 391.

2 *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA, followed in *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA.

3 *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485.

4 *Whitehead v Price* (1835) 2 Cr M & R 447, followed in *Mayall v Mitford* (1837) 6 Ad & El 670; *Shaw v Robberds* (1837) 6 Ad & El 75; *Pim v Reid* (1843) 6 Man & G 1.

5 Eg in the case of insurances on timber: *F Gliksten & Son Ltd v State Assurance Co* (1922) 10 Ll L Rep 604; cf *Palatine Insurance Co v Gregory* [1926] AC 90, PC.

6 The description may be expressed in the negative: *Dobson v Sotheby* (1827) Mood & M 90; *Stokes v Cox* (1856) 1 H & N 533, Ex Ch.

7 The validity of the policy is not affected if the misdescription is due to the fault of the insurers or their agent: *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485, following *Parsons v Bignold* (1846) 15 LJCh 379.

8 *Sillem v Thornton* (1854) 3 E & B 868, as explained in *Thompson v Hopper* (1858) EB & E 1038, Ex Ch; *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(iii) Risk in relation to Circumstances affecting the Subject Matter or the Incidence of the Peril/120. Nature of the insured's business.

120. Nature of the insured's business.

Considerations of the surrounding circumstances apply in relation to other types of insurance, such as public liability insurance¹ or pecuniary loss insurance². For example, if a person carries on business as a demolition contractor, this will be recognised as a matter of general knowledge as an occupation involving substantial risks to employees and members of the public, but these risks will be greatly increased if explosives are used in the operations. If the insured takes out a policy of insurance against accidents to third parties arising out of a demolition, and in answer to a question in the proposal form, which is made the basis of the contract³, states that he does not use explosives in his business, the risk insured is the risk arising from a demolition otherwise than by the use of explosives and, if an accident occurs of which the cause or contributing cause is the use of explosives, the insurers are not liable⁴.

1 As to public liability insurance see PARAS 690-691 post.

2 As to pecuniary loss insurance see PARAS 780-804 post.

3 As to the proposal form as the basis of the contract see PARA 62 ante.

4 *Beauchamp v National Mutual Indemnity Co Ltd* [1937] 3 All ER 19, where it was also held that the denial of the use of explosives amounted to a warranty that they would not be used and that there had been a change in the risk. As to conditions circumscribing the risk see PARA 95 ante. As to alteration of the risk see PARAS 123-128 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(iv) Misdescription of the Risk/121. Adequacy of description.

(iv) Misdescription of the Risk

121. Adequacy of description.

Any description, whether of the locality of the property insured or of the circumstances affecting the subject matter or the incidence of the peril, is, in general, sufficient if it is substantially accurate¹. In other words a misdescription must be material if it is to affect the validity of the policy². However, this is subject to the terms of any express condition contained in the policy. Such conditions are frequently limited to material misdescriptions; but if the language used is so stringent as to cover any misdescription, however immaterial, the policy will be voidable at the option of the insurers³.

1 *Doe d Pitt v Laming* (1814) 4 Camp 73; *Dobson v Sotheby* (1827) Mood & M 90 at 92 per Lord Tenterden CJ; *Friedlander v London Assurance Co* (1832) 1 Mood & R 171; *South Australian Insurance Co v Randell* (1869) LR 3 PC 101.

2 *Re Universal Non-Tariff Fire Insurance Co, Forbes & Co's Claim* (1875) LR 19 Eq 485.

3 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(iv) Misdescription of the Risk/122. Descriptions and representations.

122. Descriptions and representations.

Descriptive words used in a policy, whether on its face or by reference to incorporated documents such as a proposal, are operative as a description of the risk as at the date of the insurance¹. If the words are used in relation to the future they can, of course, only operate as representations², and where they are accurate when made, there is no breach of duty by the insured if a subsequent change of events falsifies them in the absence of fraud³ on his part⁴. If, however, on their true construction, the words are not merely a representation as to the future but a present definition or limitation of the risk in respect of which insurance is sought and given, no question of innocence or guilt on the part of the insured arises⁵; no liability attaches to the insurers unless the loss takes place in the circumstances⁶ or in the locality⁷ which by the description has been made a fundamental term of the policy. It is always a question of interpretation of the policy into which category descriptive words fall⁸. This question of interpretation is often assisted by the presence in the policy of express conditions indicating the circumstances in which, in the event of an alteration of risk, the insured is entitled to recover or the insurers are relieved of liability⁹.

1 *Shaw v Robberds* (1837) 6 Ad & El 75 at 82 per Lord Denman CJ. Where a condition as to the accuracy of the description of the premises insured and the trade carried on there relates to the description at the time of the insuring, if the description was correct at that date, nothing which occurs afterwards can amount to a breach of condition: *Sillem v Thornton* (1854) 3 E & B 868, as explained in *Thompson v Hopper* (1858) EB & E 1038; *Stokes v Cox* (1856) as reported in 1 H & N 320 at 335 per Bramwell B; on appeal 1 H & N 533, Ex Ch; *Hussain v Brown* [1996] 1 Lloyd's Rep 627, CA.

2 *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744; *Grant v Aetna Insurance Co* (1862) 15 Moo PCC 516.

3 As to the effect of fraud see PARA 54 ante.

4 *Pim v Reid* (1843) 6 Man & G 1 at 22 per Maule J; *Sweeney v Kennedy* (1948) 82 LI L Rep 294, Eire DC; *Hales v Reliance Fire and Accident Insurance Corp'n Ltd* [1960] 2 Lloyd's Rep 391. There may, however, be a breach of a condition against alteration: see PARAS 127-128 post.

5 *Re Morgan and Provincial Insurance Co Ltd* [1932] 2 KB 70, CA; affd on different grounds, but without dissent from the reasoning in the Court of Appeal [1933] AC 240, HL. See also PARA 125 post.

6 *Farr Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *Murray v Scottish Automobile and General Insurance Co* 1929 SC 49.

7 *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL; *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237; *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233; *Re Calf and Sun Insurance Office* [1920] 2 KB 366 at 385, CA, per Younger LJ; cf *Lilley v Doubleday* (1881) 7 QBD 510.

8 *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744; *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900. As to interpretation of the policy generally see PARAS 83-89 ante.

9 As to such conditions see PARA 127 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/123. Alteration of the subject matter.

(v) Alteration of the Risk

123. Alteration of the subject matter.

Where the policy is so framed that the peril insured against is qualified in the sense that it must affect the insured in relation to a subject matter of a defined character or in circumstances of a defined nature, the insurers' obligation is confined to the particular risk which has been so indicated. Therefore, if the risk, in this sense, is altered, their obligation ceases¹. Such an alteration occurs whenever something is done which affects the stipulated risk, whether as regards its subject matter², locality³ or circumstances⁴. The alteration must be a real alteration making the risk a different risk; there is no alteration of the risk if the alteration made is one which was within the contemplation of the parties when they entered into the contract of insurance⁵.

¹ *Law, Guarantee, Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138 at 153-154 per Warrington J.

² *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL; *Sillem v Thornton* (1854) 3 E & B 868, as explained in *Thompson v Hopper* (1858) EB & E 1038 at 1049, Ex Ch; *Shaw v Royce Ltd* [1911] 1 Ch 138; *Law, Guarantee, Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138 at 153-154; *Beauchamp v National Mutual Indemnity Co Ltd* [1937] 3 All ER 19; and see PARA 120 text and notes 3-4 ante.

³ *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL; *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224.

⁴ *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516; *Cosford Union v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1910) 103 LT 463, DC; *Hadenfayre Ltd v British National Insurance Society Ltd* [1984] 2 Lloyd's Rep 393 (contingency insurance).

⁵ *Re Albert Life Assurance Co, Bell's Case, Craig's Executors' Case* (1870) LR 9 Eq 706 at 719 per James V-C; *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224 at 236 per Palles CB; *Law, Guarantee, Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138 at 154 per Warrington J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/124. Change of identity.

124. Change of identity.

Where the subject matter of the insurance is so changed as to alter its identity, there is in effect a substitution of a new subject matter to which the policy does not attach¹. However, the subject matter of insurance may remain the same, even though temporarily the thing insured is separated into parts for repairs².

1 *Cosford Union v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1910) 103 LT 463 at 465, DC; *Shaw v Royce Ltd* [1911] 1 Ch 138; *Law, Guarantee, Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138.

2 *Seaton v London General Insurance Co Ltd* (1932) 48 TLR 574 (insured lorry; engine removed for repair and taken elsewhere, but rest of lorry left in usual garage; engine destroyed by fire when at place of repair; damage held covered by insurance).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/125. Change of circumstances comprised in definition.

125. Change of circumstances comprised in definition.

There may be an alteration of the risk not affecting the identity of the subject matter¹ which amounts to an alteration of the risk where the alteration is such that the risk no longer corresponds with that defined in the policy². Where the definition of the risk includes a description of locality, or of circumstances such as the purpose for which the subject matter is used, the subject matter must, at the time of its loss, be in the locality³ or be used for the purpose described⁴; the insurers are not responsible if its loss takes place whilst it is in a different locality⁵ or is being used for a different purpose⁶. In this case, however, unless the policy expressly so provides, the alteration of the risk does not avoid the policy but merely suspends its operation during the continuance of the alteration⁷. If the subject matter is returned to the locality described⁸ or is again used in accordance with the description⁹, the policy reattaches.

1 As to alterations affecting the subject matter and its identity see PARAS 123-124 ante.

2 *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498 at 503, HL, per Lord Cairns LC.

3 As to locality as part of the description of the risk see PARA 118 ante; and see the cases cited in PARA 122 note 7 ante, and *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL. If removal has been authorised, the subject matter must be in the newly authorised locality: *McClure v Lancashire Insurance Co* (1860) 6 Ir Jur 63.

4 *Re Morgan and Provincial Insurance Co Ltd* [1932] 2 KB 70, CA; affd sub nom *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL.

5 *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

6 *Stuart v Horse Insurance Co* (1893) 1 SLT 91; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA.

7 *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp plc* [1989] 1 Lloyd's Rep 299 (burglary insurance).

8 *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224.

9 *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/126. Increase of likelihood of loss.

126. Increase of likelihood of loss.

Where insurers have issued a policy providing insurance against specified perils, their obligation to make payment in the event of the peril occurring is, in the absence of any qualifying conditions, absolute in the sense that the only question is whether the event which has occurred falls within the definition of the perils insured against¹. It is immaterial that the insured by his conduct may have increased the likelihood of the peril occurring², even if it can be shown that his conduct was the direct cause of the loss³. Unless prohibited by the policy, such conduct does not avoid the insurance⁴.

1 As to the nature of the peril insured against see PARA 115 ante.

2 *Baxendale v Harvey* (1859) 4 H & N 445 at 449 per Pollock CB.

3 *Shaw v Robberds* (1837) 6 Ad & El 75.

4 *Pim v Reid* (1843) 6 Man & G 1; *Thompson v Hopper* (1858) EB & E 1038 at 1049, Ex Ch, per Willes J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/127. Policy conditions dealing with alterations.

127. Policy conditions dealing with alterations.

A policy may contain express conditions dealing with alterations of the risk. They are usually expressed in prohibitive or restrictive terms, and may be classified as: (1) conditions prohibiting or restricting an increase of the risk; (2) conditions prohibiting or restricting the removal of the subject matter from a particular locality; and (3) conditions prohibiting or restricting changes of circumstances.

To constitute a breach of a condition of the first kind, the risk must be increased by the alteration¹. By the terms of a particular condition, an alteration, though increasing the risk, may be allowed if notice is given to the insurers² or their sanction is obtained³.

Examples of the second kind occur in life or personal accident policies, travel policies⁴ or fire or burglary policies, under which the removal of goods may be prohibited or restricted.

Conditions of the third kind deal with a variety of circumstances, for example the trade or business carried on by the insured⁵, including the methods of business⁶ and the use to which the subject matter may be put⁷. Where the insurance is connected with a building, its use⁸ or even the presence⁹ in it of certain specified articles may be prohibited or restricted; and the building may be required always to be occupied¹⁰.

1 *Barrett v Jermy* (1849) 3 Exch 535; *Stokes v Cox* (1856) 1 H & N 533; *Hales v Reliance Fire and Accident Insurance Corp'n Ltd* [1960] 2 Lloyd's Rep 391 (fire insurance); cf *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 609, CA, per A L Smith LJ. This is a question of fact: *Baxendale v Harvey* (1859) 4 H & N 445; *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154, CA.

2 *Glen v Lewis* (1853) 8 Exch 607.

3 A condition requiring notice to the insurers does not necessarily involve obtaining their sanction: *Re Birkbeck Permanent Benefit Building Society, Official Receiver v Licences Insurance Corp'n* [1913] 2 Ch 34.

4 *Wing v Harvey* (1854) 5 De GM & G 265; cf *Fowler v Scottish Equitable Life Insurance Society and Ritchie* (1858) 28 LJCh 225; *Notman v Anchor Assurance Co* (1858) 4 CBNS 476; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237.

5 *Shaw v Robberds* (1837) 6 Ad & El 75; *Pim v Reid* (1843) 6 Man & G 1; see also *Hall v Star Fire Insurance Co* (1850) 14 LTOS 135, 446.

6 *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900, where, however, the statement was treated not as a condition but as a representation.

7 *Whitehead v Price* (1835) 2 Cr M & R 447, followed in *Mayall v Mitford* (1837) 6 Ad & El 670; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240 at 254, HL, per Lord Wright.

8 *Barrett v Jermy* (1849) 3 Exch 535; *Glen v Lewis* (1853) 8 Exch 607; *Stokes v Cox* (1856) 1 H & N 533; *Farnham v Royal Insurance Co Ltd* [1976] 2 Lloyd's Rep 437; *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* [1984] 1 Lloyd's Rep 149, CA (fire insurance); *Linden Alimak Ltd v British Engine Insurance Ltd* [1984] 1 Lloyd's Rep 416 (extraneous damage insurance).

9 *M'Ewan v Guthridge* (1860) 13 Moo PCC 304; *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73; *Citizens Insurance Co of Canada v Parsons* (1881) 7 App Cas 96, PC; *Thompson v Equity Fire Insurance Co* [1910] AC 592, PC.

10 *Simmonds v Cockell* [1920] 1 KB 843; *Marzouca v Atlantic and British Commercial Insurance Co Ltd* [1971] 1 Lloyd's Rep 449, PC.

UPDATE

127 Policy conditions dealing with alterations

NOTE 2--See *Ansari v New India Assurance Ltd* [2009] EWCA Civ 93, [2009] 2 All ER (Comm) 926.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(6) THE RISK/(v) Alteration of the Risk/128. Alterations which constitute a breach.

128. Alterations which constitute a breach.

Where there has been an alteration of the risk, the scope and ambit of the relevant condition must be examined because there can only be a breach of the condition if the alteration falls within its terms¹. Whether the alteration must be of a permanent or habitual nature², or whether a temporary or casual alteration constitutes a breach, depends on the construction of the particular condition³.

1 *Shaw v Robberds* (1837) 6 Ad & El 75 at 83 per Lord Denman CJ; *Barrett v Jermy* (1849) 3 Exch 535 at 543 per Parke B; *Stokes v Cox* (1856) 1 H & N 533 at 540 per Cockburn CJ.

2 *Dobson v Sotheby* (1827) Mood & M 90; *Shaw v Robberds* (1837) 6 Ad & El 75; *Thompson v Equity Fire Insurance Co* [1910] AC 592, PC.

3 *Glen v Lewis* (1853) 8 Exch 607.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(i) In general/129. Nature and assessment of premium.

(7) THE PREMIUM

(i) In general

129. Nature and assessment of premium.

The consideration required of an insured for any form of insurance is a money payment universally referred to as a premium¹. There may be a single lump sum premium, but more usually the premium is payable either at specified intervals, as in the case of life assurance, or as consideration for successive renewals of the policy. The amount of the premium appropriate to the risk involved is essentially a matter for the insurers, as experts in the business, to assess², but their assessment is not binding unless the insured prospectively or retrospectively agrees that it should be so. In making their assessment insurers normally work on the basis of an average of their previous experience of comparable risks³, increasing or perhaps reducing the figure according to their estimate as to whether the graph of the risk is tending or likely to rise or fall. The rate of premium in fact charged may give rise to important inferences. The materiality of a representation which has been made may be inferred from a reduced rate of premium being charged⁴. Similarly, ignorance on the part of the insurers of some matter supposed to be well known may be inferred if they charge no more than the ordinary rate of premium, while an exceptionally high rate of premium may be indicative of their acceptance of the risk as hazardous without requiring disclosure of the precise facts making it so⁵.

1 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J; see also *Municipal Mutual Insurance Ltd v Pontefract Corpn* (1917) 116 LT 671 at 674 per Sankey J. Not every part of the sum paid to the insurers is properly regarded as premium; this may be important when the court is assessing the amount of an 'after the event' insurance premium paid by a claimant in respect of proceedings brought by him and recoverable from the defendant in an order for costs: see *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000; *Re Claims Direct Test Cases* [2003] EWCA Civ 136; as to after the event insurance see PARA 807 post.

2 Hence, the amount charged for the premium is of assistance to show the scope of the policy: *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 611, CA, per Collins LJ.

3 *Chapman v Pole, PO* (1870) 22 LT 306 at 307 per Cockburn J; *Thomson v Weems* (1884) 9 App Cas 671 at 681, HL, per Lord Blackburn.

4 *Court v Martineau* (1782) 3 Doug KB 161; *Bridges v Hunter* (1813) 1 M & S 15; *Tate v Hyslop* (1885) 15 QBD 368, CA.

5 *Court v Martineau* (1782) 3 Doug KB 161; *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452 at 466, CA, per Fletcher Moulton LJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(i) In general/130. Agreement as to premium.

130. Agreement as to premium.

There cannot be a contract of insurance unless and until the premium is agreed¹. There need not be agreement as to the exact amount, provided the rate or basis of assessment is agreed². In particular, there are some classes of insurance in which the extent of the risk cannot be measured until the period of insurance has expired; a provisional premium is then paid at the commencement of the period, and a final adjustment is made at the end of the period³. Provision may also be made for reducing the premium where the risk turns out to be less than was anticipated. In motor insurance a deduction by way of bonus may be allowed from the premium for the following year in the event of no claim being made under the policy during the current year, the 'no claims bonus'⁴. If the allowance of bonus is at the discretion of the insurers, their decision to allow no bonus, if made in good faith, cannot be challenged⁵.

1 *Canning v Farquhar* (1886) 16 QBD 727 at 731, 734, CA; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC; *Murfitt v Royal Insurance Co Ltd* (1922) 38 TLR 334; *Kirby v Cosindit Societa per Azioni* [1969] 1 Lloyd's Rep 75 (builders' risk insurance); *American Airlines Inc v Hope, Banque Sabbag SAL v Hope* [1973] 1 Lloyd's Rep 233, CA (additional premium for war risks in respect of aircraft not agreed before they were destroyed) (affd on different grounds [1974] 2 Lloyd's Rep 301, HL).

2 For the method of agreeing the premium payable in marine insurance see PARAS 270, 324 text and note 3 post.

3 As to the calculation of the premium in liability insurance see PARA 666 post.

4 As to no claims bonus clauses see further PARA 727 post.

5 *Want v Blunt* (1810) 12 East 183; *Manby v Gresham Life Assurance Society* (1861) 29 Beav 439.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(i) In general/131. Payment of premium.

131. Payment of premium.

The premium may be paid by the insured to the insurers or to an insurance agent acting on behalf of the insurers. If the agent has authority to receive it, the payment binds the insurers¹. The authority need not be an express authority, but may be implied by the circumstances². In this case payment to the agent is binding, though he has ceased to represent the insurers, unless the insured has notice that his agency has ceased³. The right of the personal representatives of the insured to pay a premium on a life assurance if the insured dies after the due date for payment, but before the expiry of the days of grace, is considered subsequently⁴.

1 *Acey v Fernie* (1840) 7 M & W 151. For a discussion as to the status of a collector see *Co-operative Insurance Society Ltd v Richardson* (1955) Times, 5 March.

2 *Rossiter v Trafalgar Life Assurance Association* (1859) 27 Beav 377; cf *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291; see also *Kelly v London and Staffordshire Fire Insurance Co* (1883) Cab & El 47; cf *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900 at 916, CA in Ch, per Turner LJ.

3 *Wing v Harvey* (1854) 5 De GM & G 265; *Re European Assurance Society Arbitration Acts and Wellington Reversionary Annuity and Life Assurance Society, Conquest's Case* (1875) 1 ChD 334, CA.

4 As to the effect of tendering a premium during days of grace see PARA 167 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(i) In general/132. Form of payment.

132. Form of payment.

The form of payment must be as required by the contract. If made to an insurance agent, payment of the premium must be made in a form in which the agent is authorised to receive it¹. Hence, delivery of a promissory note is not binding on the insurers as payment², unless authorised³. Payment in a form which is not authorised does not bind the insurers until the agent has, in fact, received cash payment⁴, and an agreement between the agent and the insured by which the insured is given credit is not effective unless the money is actually received by the insurers during the days of grace⁵. Where the premium is to be collected by the insurers from the insured's bank account, the insurers' failure to send the correct documents to the bank to ensure payment is not to be regarded as failure to pay on the part of the insured⁶.

1 *Acey v Fernie* (1840) 7 M & W 151.

2 *Montreal Assurance Co v M'Gillivray* (1859) 13 Moo PCC 87.

3 *London and Lancashire Life Assurance Co v Fleming* [1897] AC 499, PC.

4 *Acey v Fernie* (1840) 7 M & W 151; *London and Lancashire Life Assurance Co v Fleming* [1897] AC 499, PC.

5 *Acey v Fernie* (1840) 7 M & W 151. As to days of grace see PARAS 166-167 post.

6 Cf *Fontana v Skandia Life Assurance Ltd* (14 December 2000, unreported), CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(i) In general/133. Agreements as to payment with insurance agent.

133. Agreements as to payment with insurance agent.

An insurance agent may agree to advance the money for the premium and to pay it on behalf of the insured to the insurers¹, in which case the insurers are not bound until they have received payment from the agent. It is immaterial in what form they receive it, and a settlement of accounts between the agent and the insurers is, therefore, valid². It is probably sufficient if the amount of the premium is debited in account, either by the agent or by the insurers³. If there is no agreement between the agent and the insured for the money to be advanced, the insured cannot take advantage of any debit in account between the agent and the insurers⁴, nor can he take advantage of a settlement of account between them⁵ or even of an actual payment by the agent to the insurers⁶.

1 *Acey v Fernie* (1840) 7 M & W 151 at 155 per Lord Abinger CB; *Busteed v West of England Fire and Life Insurance Co* (1857) 5 I Ch R 553.

2 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255 at 264, HL, per Lord Eldon.

3 *Prince of Wales Assurance Co v Harding* (1858) EB & E 183; *Re Law Car and General Insurance Corp* [1911] WN 101, CA.

4 *Acey v Fernie* (1840) 7 M & W 151 at 155 per Parke B; *Busteed v West of England Fire and Life Insurance Co* (1857) 5 I Ch R 553; *London and Lancashire Life Assurance Co v Fleming* [1897] AC 499, PC; see also *Browne v Price* (1858) 4 CBNS 598.

5 *London and Lancashire Life Assurance Co v Fleming* [1897] AC 499, PC.

6 *Busteed v West of England Fire and Life Insurance Co* (1857) 5 I Ch R 553.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(ii) Prepayment of Premium/134. Insured's liability to pay premium.

(ii) Prepayment of Premium

134. Insured's liability to pay premium.

As soon as the contract is agreed, the insured becomes liable to pay the premium¹, but his failure to pay it does not absolve the insurers from their liability under the contract unless there is a provision in the contract to this effect, or the failure to pay the premium amounts in the circumstances to a repudiation of the contract². In the event of a loss happening before payment, the insurers must pay the amount due under the contract³ unless the contract otherwise provides.

1 *General Accident Insurance Corpn v Cronk* (1901) 17 TLR 233.

2 *Salvin v James* (1805) 6 East 571; *Edge v Duke* (1849) 18 LJCh 183; *Figre Ltd v Mander* [1999] Lloyd's Rep IR 193.

3 *Kelly v London and Staffordshire Fire Insurance Co* (1883) Cab & El 47; *Thompson v Adams* (1889) 23 QBD 361; *Roberts v Security Co* [1897] 1 QB 111, CA; *Adie & Sons v Insurance Corpn Ltd* (1898) 14 TLR 544.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(ii) Prepayment of Premium/135. Prepayment as a condition precedent.

135. Prepayment as a condition precedent.

In practice, payment of the premium in advance is usually made a condition precedent to liability¹, not only in the case of the first premium but also of any renewal premium. The insured is then precluded from recovering for a loss which happens before the premium is paid² unless the circumstances are such that the insurers are estopped from denying that they have received payment³, or have by their conduct waived the condition⁴. There may, for example, be a waiver by an agreement to give credit⁵ or by the giving of an antedated receipt⁶, but there is no waiver where an insurance agent accepts premiums in arrear unless he has authority from the insurers to do so⁷.

1 As to conditions precedent to liability see PARA 96 ante.

2 *Tarleton v Staniforth* (1796) 1 Bos & P 471, Ex Ch; *London and Lancashire Life Assurance Co v Fleming* [1897] AC 499, PC; *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC; cf *Re Albert Life Assurance Co, Cook's Policy* (1870) LR 9 Eq 703; *Canning v Farquhar* (1886) 16 QBD 727 at 731, CA, per Lord Esher MR. As to payment during days of grace see PARA 167 post.

3 *Re Economic Fire Office Ltd* (1896) 12 TLR 142 (receipt given by insurers' agent who had authority to give receipts for premiums not paid). As to estoppel see PARA 113 ante.

4 *Cia Tirrena di Assicurazioni SpA v Grand Union Insurance Co Ltd* [1991] 2 Lloyd's Rep 143 (reinsurance). Cf *Daff v Midland Colliery Owners' Mutual Indemnity Co* (1913) 82 LJB 1340 at 1344, HL. As to what constitutes a waiver see PARA 112 ante.

5 *Prince of Wales Assurance Co v Harding* (1858) EB & E 183.

6 *Howell v Kightley* (1856) 21 Beav 331 at 335 per Lord Romilly MR (affd 8 De GM & G 325, CA in Ch); cf *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622; *Ocean Accident and Guarantee Corp Ltd v Cole* [1932] 2 KB 100 at 106, DC, per Avory J.

7 *British Industry Life Assurance Co v Ward* (1856) 17 CB 644.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/136. Return of premiums on total failure of consideration.

(iii) Return of Premium

136. Return of premiums on total failure of consideration.

The insured is entitled to a return of premium when there has been a total failure of the consideration for which he paid it, in the sense that the risk has never attached¹. This does not, of course, mean that the premium is returnable if the peril has not, in fact, materialised; the test is whether the insurers have been, for however short a time, at risk, that is to say potentially liable to make a payment in the event of the peril materialising. Thus, if there never was a binding contract between the parties because the purported contract was ultra vires as regards the insurers², or was vitiated by a fundamental mistake³, the insurers must repay what they have received for a risk which, in fact, they never ran. Similarly, where the policy has never begun to be operative owing to non-fulfilment of a warranty or condition precedent⁴ of the policy, any premium which has been paid must be repaid unless the policy expressly provides that the premium is to be forfeited⁵. Equally, if it transpires that there never was any subject matter of the insurance, as where a person whose life is insured is found to have died before the date of the insurance⁶ or where a supposed insurable interest in a life insured is found to be an illusion⁷, the insurers cannot profit from an honest mistake or misunderstanding.

1 *Tyrie v Fletcher* (1777) 2 Cowp 666 at 668 per Lord Mansfield CJ. For the position where the risk has attached see PARA 139 post. As to the failure of a policy to attach in marine insurance see PARA 505 post.

2 *Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597n, CA.

3 *Fowler v Scottish Equitable Life Insurance Society and Ritchie* (1858) 28 LJCh 225. As to mistake generally see CONTRACT vol 9(1) (Reissue) PARAS 888-896; and MISTAKE.

4 As to warranties and conditions precedent see PARAS 94, 96 ante.

5 *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL, per Lord Blackburn.

6 *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622 at 645 per Byles J.

7 *Desborough v Curlewis* (1838) 3 Y & C Ex 175 at 177. As to the requirement of an insurable interest in a life policy see PARA 535 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/137. Return of premiums in case of illegality.

137. Return of premiums in case of illegality.

The principle that the premium may be returned applies, subject to qualifications, in the case of a contract which is vitiated by illegality. Prima facie such a contract is void from the outset, and any premium which has been received by the insurers for a risk which has never commenced to run is returnable¹. However, if the risk purporting to be insured has commenced to run, the insured can only recover the premium he has paid if he is untainted by the illegality². Where both parties are equally at fault, the insured forfeits his premium as the penalty for his breach of the law³, and the onus is on the insured to establish his innocence in this respect⁴.

1 *Busk v Walsh* (1812) 4 Taunt 290, following *Aubert v Walsh* (1810) 3 Taunt 277. See also *Jaques v Golightly* (1777) 2 Wm BI 1073. As to illegal contracts see generally CONTRACT vol 9(1) (Reissue) PARA 836 et seq. As to the recovery of money paid in pursuance of an illegal contract see RESTITUTION vol 40(1) (2007 Reissue) PARA 106.

2 *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA, as explained in *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA, and in *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482, CA. See also *London, Edinburgh and Glasgow Assurance Co Ltd v Partington* (1903) 88 LT 732, DC; *Tofts v Pearl Life Assurance Co Ltd* [1915] 1 KB 189, CA; and cf *Brewster v National Life Insurance Society* (1892) 8 TLR 648, CA.

3 *Howard v Refuge Friendly Society* (1886) 54 LT 644, followed in *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *Phillips v Royal London Mutual Insurance Co Ltd* (1911) 105 LT 136; *Evanson v Crooks* (1911) 106 LT 264; *Elson v Crookes* (1911) 106 LT 462; *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291. See also *Drummond v Deey* (1794) 1 Esp 151; *Paterson v Powell* (1832) 9 Bing 320.

4 *Howarth v Pioneer Life Assurance Co Ltd* (1912) 107 LT 155, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/138. Return of premiums when policy voidable.

138. Return of premiums when policy voidable.

Where a policy is obtained by misrepresentation or non-disclosure of material facts it is a valid and binding contract unless and until the insurers discover the true facts and, on discovering them, elect to avoid it. If, where there has been no fraud, they elect to repudiate a continuing insurance, they nullify the contract from the beginning and thereby sacrifice any premiums which they have collected¹. However, in the case of a renewable insurance each renewal is a new contract and the premium returnable is limited to that paid for the last renewal, as the risk has, in fact, been fully borne by the insurers throughout all the earlier years. If there has been fraud on the part of the insured, there is normally no right to a return of premium, as the insured cannot make his own fraud a basis of a claim². If the insurers have to apply to the court for relief, the court has power to declare the premium forfeited³, although in its discretion it may make a condition of giving relief that premiums should be returned⁴. In the case of fraud on the part of the insurers the premiums obtained by means of the fraud are recoverable by the insured⁵.

1 *Thomson v Weems* (1884) 9 App Cas 671 at 682, HL, per Lord Blackburn; *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365, following *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; see also *London Assurance v Mansel* (1879) 11 ChD 363. The Limitation Act 1980 s 5 applies to claims for return of premium (*Molloy v Mutual Reserve Life Insurance Co* (1906) 22 TLR 525, CA), but time does not run until the fraud is discovered (Limitation Act 1980 s 32(1) (amended by the Consumer Protection Act 1987 s 6(6), Sch 1 para 5); *Beer v Prudential Assurance Co* (1902) 66 JP 729): see LIMITATION PERIODS vol 68 (2008) PARA 1220.

2 *Feise v Parkinson* (1812) 4 Taunt 640 at 641 per Gibbs CJ; *Anderson v Thornton* (1853) 8 Exch 425; *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917 at 927 per Crompton J, and at 931 per Mellor J; *Rivaz v Gerussi* (1880) 6 QBD 222 at 229, CA, per Brett LJ; *HIH Casualty and General Insurance Co v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] Lloyd's Rep 161, [2001] Lloyd's Rep IR 596.

3 *British Equitable Insurance Co v Musgrave* (1887) 3 TLR 630.

4 *Barker v Walters* (1844) 8 Beav 92; *Prince of Wales etc Association Co v Palmer* (1858) 25 Beav 605; cf *Whittingham v Thornburgh* (1690) 2 Vern 206.

5 *Duffell v Wilson* (1808) 1 Camp 401; *Mutual Reserve Life Insurance Co v Foster* (1904) 20 TLR 715, HL; *Cross v Mutual Reserve Life Insurance Co* (1904) 21 TLR 15; *Merino v Mutual Reserve Life Insurance Co* (1904) 21 TLR 167; *Refuge Assurance Co v Kettlewell* [1909] AC 243, HL.

UPDATE

138 Return of premiums when policy voidable

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/139. No return of premiums when risk has attached.

139. No return of premiums when risk has attached.

The essence of the right to a return of premium is the failure of the consideration moving from the insurers¹, in other words the fact that the risk never attached. The fact that a particular event does not occur during the currency of the policy does not mean that there was never a risk, so far as the insurers were concerned, of that event occurring². If a life policy contains an exception in respect of suicide and the insured commits suicide during the currency of the policy, the policy will not be enforceable; the premium is not returnable because the insurers were at all times on risk as regards death from natural, as opposed to self-induced, causes³. These rules are the result of applying to the law of insurance the ordinary principle of the law of contract, that a total failure of consideration on the one side is necessary to give a cause of action for repayment of consideration moving from the other side⁴.

1 *Wolenberg v Royal Co-operative Collecting Society* (1915) 112 LT 1036, DC.

2 *Tyrie v Fletcher* (1777) 2 Cowp 666 at 668 per Lord Mansfield CJ.

3 *Tyrie v Fletcher* (1777) 2 Cowp 666; see PARAS 530-531 post.

4 As to total failure of consideration see CONTRACT vol 9(1) (Reissue) PARA 992; RESTITUTION vol 40(1) (2007 Reissue) PARA 87 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/140. Partial return of premiums.

140. Partial return of premiums.

A modification of the ordinary principle of the law of contract exists in relation to insurance in this respect, that a partial failure of the consideration moving from the insurers may entitle the insured to a partial return of premium¹. For example, where there is an innocent over-insurance², as in the case of a liability insurance where the premium is calculated on the number of persons employed in the relevant period, a pro rata return of premium may be provided for if a lower number of persons is, in fact, employed than was assumed as the basis of the calculation³. Similarly, if a premium is charged by the insurers for a fixed period, such as a year, any right they may have to terminate the contract before the expiration of that period, without any agreed excuse for doing so, will normally be exercisable only on the basis of making a pro rata refund of premium⁴.

1 For the circumstances which may entitle the insured to a partial return of premium in connection with marine insurance see PARA 501 et seq post. For the general rule as to partial failure of consideration see CONTRACT vol 9(1) (Reissue) PARA 992.

2 As to over-insurance by double insurance see PARAS 206-209 post.

3 As to the calculation of the premium in liability insurance see PARA 666 post.

4 In principle a pro rata refund can be claimed only if the policy contains some stipulation which leads to the policy being interpreted as divisible: see *Stevenson v Snow* (1761) 3 Burr 1237, and other marine cases discussed in PARA 504 note 2 post. Normally it will be found that any condition in a policy giving any contractual right of termination is coupled with an undertaking to make a pro rata return of premium if the right is exercised.

UPDATE

140 Partial return of premiums

NOTE 4--See *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] 2 All ER (Comm) 367 (no right to partial refund in a case of a single risk policy which could not be sensibly divided).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/141. Policy conditions as to return of premiums.

141. Policy conditions as to return of premiums.

Policies frequently contain express stipulations as to return of premiums. Such stipulations may be made on the basis of reduction of the risk insured¹ or on the basis of termination of the policy before the expiration of the contemplated period of insurance². In motor insurance it is often provided that the insurance may be terminated on notice given either by the insurers³ or by either party to the contract; and any such stipulation is usually coupled with a provision for a return to some extent of the premium paid. Any express stipulation on those lines is overriding, in the sense that the agreed terms of the stipulation are operative in preference to any result which might be deduced from the general law in the absence of express stipulation⁴.

1 See *Parr's Bank v Albert Mines Syndicate* (1900) 5 Com Cas 116.

2 See *Sun Fire Office v Hart* (1889) 14 App Cas 98 at 100, PC.

3 *J H Moore & Co v Crowe* [1972] 2 Lloyd's Rep 563.

4 *Ionides v Harford* (1859) 29 LJEx 36. The general law does not allow for any return of premium merely because a portion only of the risk is run (*Loraine v Thomlinson* (1781) 2 Doug KB 585) unless the contract is divisible (*Stevenson v Snow* (1761) 3 Burr 1237). See further PARA 503 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/142. Effect of winding up of insurers.

142. Effect of winding up of insurers.

Where an insurer, within the statutory definition of that term¹, goes into liquidation, the insured is entitled to prove for the value of the policy at the date of the liquidation as determined by rules made under the Insolvency Act 1986 and the Financial Services and Markets Act 2000². In the case of the liquidation of any other insurance company a just estimate of the value of the policy must be made³.

1 As defined in the Financial Services and Markets Act 2000 (Insolvency) (Definition of 'Insurer') Order 2001, SI 2001/2634.

2 I.e. the Insurers (Winding Up) Rules 2001, SI 2001/3635 (as amended); see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 508.

3 *Re Northern Counties of England Fire Insurance Co* (1885) 1 TLR 629.

UPDATE

142 Effect of winding up of insurers

NOTES--See Case C-28/03 *Epikouriko Kefalaio v Ipourgios Anaptixis* [2004] 3 CMLR 1253, ECJ (Community law does not preclude priority being given to claims other than insurance claims when insurance company goes into liquidation).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/143. Effect of death of insured.

143. Effect of death of insured.

In the case of certain types of insurance, such as property insurance, which are not inherently personal to the insured, if the insured dies, his insurable interest and his interest in the policy normally pass to his personal representatives¹. However, where the whole policy is dependent on the continued existence of the insured, as in all types of liability insurance, it will inevitably terminate on his death². In the absence of a stipulation in the policy covering that contingency, this gives no right to any return of premium if the risk has attached and there has not been a total failure of consideration³.

1 As to the passing of the deceased's interest see PARA 152 text and note 1 post.

2 As to the termination of such insurances by the death of the insured see further PARA 152 text and note 2 post.

3 As to return of premium when the risk has attached see PARA 139 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/144. Bankruptcy of the insured.

144. Bankruptcy of the insured.

Apart from express stipulations to that effect, the bankruptcy, as opposed to the death¹, of any individual insured does not put an end to a policy of insurance². If a policy by its terms terminates on bankruptcy, no question arises as to any return of premium if the risk has attached and there has not been a total failure of consideration, unless there is a provision to that effect³.

1 As to the effect of the death of the insured see PARA 143 ante.

2 As to the effect on the policy of the bankruptcy of the insured see PARA 153 post.

3 As to return of premium when the risk has attached see PARA 139 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(7) THE PREMIUM/(iii) Return of Premium/145. Forfeiture of premium.

145. Forfeiture of premium.

Policies frequently contain conditions providing that on the occurrence of specific events any premium paid is to be forfeited. The most common conditions of this class deal with the situation where a policy is avoided by reason of some misstatement in the proposal¹ or some alteration of the risk². Conditions of this kind are very near to penalties and accordingly are very strictly construed³.

1 *Duckett v Williams* (1834) 2 Cr & M 348, approved in *Thomson v Weems* (1884) 9 App Cas 671, HL; *Howarth v Pioneer Life Assurance Co Ltd* (1912) 107 LT 155, DC. For terms as to misrepresentation see PARA 53 ante.

2 *Sparenborg v Edinburgh Life Assurance Co* [1912] 1 KB 195. As to alteration of the risk see PARAS 123-128 ante.

3 *Anderson v Fitzgerald* (1853) 4 HL Cas 484 at 507 per Lord St Leonards.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/146. Definite period required for insurance.

(8) DURATION OF THE POLICY

(i) Period of Insurance

146. Definite period required for insurance.

Unless a perpetual insurance is plainly intended, the period for which any insurance is to run must be defined with certainty¹ but the length is entirely a matter for agreement between the parties. There is no limitation on the period for which a non-marine policy may run². The period most commonly fixed is 12 months³, but longer periods are not unusual⁴; indeed the courts have had to deal with a single premium policy current for sixty-eight and a half years⁵ and a perpetual insurance for a single premium has been known to be effected⁶. It is, of course, permissible to define the period by reference to the occurrence of a future event⁷.

1 *Murfitt v Royal Insurance Co* (1922) 38 TLR 334 at 336 per McCardie J.

2 *M'Donnell v Carr* (1833) Hayes & Jo 256. As to the duration of policies of marine insurance see PARA 302 et seq post.

3 *Last v London Assurance Corp*n (1884) as reported in 12 QBD 389 at 394 per Day J.

4 *Sadlers' Co v Badcock* (1743) 2 Atk 554; *Sun Insurance Office v Clark* [1912] AC 443 at 451, HL, per Lord Loreburn; *Municipal Mutual Insurance v Pontefract Corp*n (1917) 116 LT 671.

5 *Brady v Irish Land Commission* [1921] 1 IR 56.

6 The war memorial in the House of Lords was insured under such an insurance.

7 In the normal life policy the period is defined as being the period up to death or the attainment of a certain age: see PARA 527 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/147. Definition of period in policy.

147. Definition of period in policy.

The policy itself frequently defines the period for which the insurance is to be current and, where it does so, normally the precise day, and sometimes the precise hour¹, at which it respectively begins and ends are specified². Unless the policy expressly so provides, the day named as the day from which the insurance is to run is not included in the period for which it runs, the moment of commencement being then the earliest moment of the succeeding day³. If the commencement is governed by an event, the precise time will depend on the definition of the event and the interpretation of what constitutes its inception⁴.

In the absence of any reference to a particular hour, a period of insurance ends at midnight at the close of the last day named⁵. Where an event is fixed as the termination of the policy, the interpretation of what constitutes the moment of happening of that event is the criterion; if the event never happens, the insurance may continue indefinitely⁶.

The policy may contain an extension clause giving the insured an option to extend its duration⁷.

¹ Expressions of time refer to Greenwich Mean Time unless the contrary is expressed: Interpretation Act 1978 ss 9, 23(3), Sch 2 paras 1, 6; as to the construction of references to a particular hour during the period of summer time see the Summer Time Act 1972 (as amended); and see TIME vol 97 (2010) PARAS 317-318.

² See *Commercial Union Assurance plc v Sun Alliance Insurance Group plc* [1992] 1 Lloyd's Rep 475.

³ *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA; *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977, Ct of Sess. See also *Isaacs v Royal Insurance Co* (1870) LR 5 Exch 296 at 300 per Kelly CB; and cf *Howard's Case* (1699) Holt KB 195.

⁴ *Dunn v Campbell* (1920) 4 Ll L Rep 36, CA, where an aviation policy was to commence 'from the time and date of the first flight', and it was held that it covered an accident which happened before the aircraft had actually left the ground. Whether a flight begins only when the pilot attempts to start the engine, as was suggested, may be doubtful.

⁵ *Isaacs v Royal Insurance Co* (1870) LR 5 Exch 296; *Heinrich Hirdes GmbH v Edmund* [1991] 2 Lloyd's Rep 546.

⁶ *General Accident Fire and Life Assurance Corpn v Robertson* [1909] AC 404 at 411, HL, obiter, per Lord Loreburn LC, where the insurance was to continue for 12 months after registration by the insurers of a coupon and they failed to keep a formal register. However, the correctness of this statement must be in some doubt and in this case the court did find a time when the insurance ended.

⁷ See eg *Touche Ross & Co v Baker* [1992] 2 Lloyd's Rep 207, HL, where the insured under a policy of professional indemnity insurance had the option, in the event of the insurers' refusing to renew, to extend the policy for 36 months after the date of termination in respect of acts committed before the date of termination.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/148. Issue of policy as commencement.

148. Issue of policy as commencement.

Even if a commencing date or hour is laid down in a policy, it is overridden by the rule that, unless otherwise provided, no policy is effective until it is issued, there being normally no acceptance of the proposal until the issue of the policy¹. Therefore, if it is not issued until after the commencement of the period named it will not cover losses happening before its issue, even if it is antedated². However, it is possible to frame a policy so as to manifest an intention, not merely to antedate it for the purpose of determining the commencing date from which the closing date is to be calculated, but also to make it retrospective as regards losses which have occurred since the proposal but before issue of the policy³. An intention that a policy is to be retrospective in this sense is plainly indicated when the policy is issued to replace a cover note⁴.

1 As to the formation of a contract to insure see PARAS 70-73 ante.

2 *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL.

3 *Bufe v Turner* (1815) 6 Taunt 338.

4 *Roberts v Security Co* [1897] 1 QB 111, CA. As to the right of the insured to enforce the cover note where its terms differ from those of the policy see PARA 75 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/149. Payment of premium as commencement.

149. Payment of premium as commencement.

Whether the policy is issued before or after a date mentioned in it as the commencing date, there may nonetheless be an express stipulation in it that the insurance is not to be operative until a stipulated event has occurred or a particular condition has been satisfied¹. The event or condition most frequently made a condition precedent in this sense is payment of the premium².

1 *Salvin v James* (1805) 6 East 571 at 582 per Lord Ellenborough CJ; *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL. For examples of specific events in marine insurance see PARAS 306-320 post.

2 As to prepayment as a condition precedent see PARA 135 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/150. Termination of policy by payment.

150. Termination of policy by payment.

Even though a stipulated period may be named in the policy for the currency of its cover, the policy may nonetheless terminate prior to the expiration of the named period. In the case of property insurance, once the stipulated peril occurs and the insurers have made a payment on the basis of a total loss, the insurers' liability is normally at an end¹; and if the property is reinstated or replaced they are not on risk again unless a fresh contract, relating to the property as reinstated or the replacing property, is entered into between them and the insured for a fresh consideration². This does not apply to partial losses; thus if a house is insured against fire, partial damage caused by successive fires, that is when severally or cumulatively the fires do not produce a total loss, must be borne individually and successively by the insurers³.

1 See eg *Brewster v Sewell* (1820) 3 B & Ald 296 at 299. Cf *North British and Mercantile Insurance Co v Stewart* (1871) 9 Macph 534, Ct of Sess, where a payment in full mistakenly made was held not to put an end to the policy, but entitled the insurer to repayment of the sum paid.

2 There is no direct insurance authority in England for this proposition, but an Australian decision (*Smith v Colonial Mutual Fire Insurance Co* (1880) 6 VLR 200) seems to assume its correctness; the conclusion seems to follow from the ordinary rule of contract law that a person is only required to do once what the contract requires of him (see eg *Edmundson v Longton Corpn* (1902) 19 TLR 15). As to the performance of contracts see generally CONTRACT vol 9(1) (Reissue) PARA 920 et seq. The policy may, of course, make express provision to the contrary effect, for example where there is a self-renewing or automatic reinstatement clause by which, after each payment of a total loss, the full sum insured is spent on reinstatement of the property and the insured, on payment usually of an additional premium, is covered in respect of the reinstated property.

3 As to valuation of partial loss see PARA 630 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/151. Termination of policy by breach of a condition.

151. Termination of policy by breach of a condition.

Policies frequently lay down express conditions as to matters which become operative after the commencement of the insurance. Such conditions are in the strict sense conditions subsequent of the policy; in the event of a breach, the insurers have the option to treat the policy as at an end¹.

1 As to conditions subsequent affecting the policy see PARA 97 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/152. Termination of policy by death of the insured.

152. Termination of policy by death of the insured.

Where an insurance is effected on property of the insured, or is in itself a form of investment so as to be property in itself, his death will not affect its duration in the absence of specific provision to that effect. Appropriate premiums having been paid, the value secured will normally pass as property to the personal representatives¹. There are certain classes of insurance which are inherently personal to the insured in the sense that they insure him personally against specific losses or liabilities or the occurrence of specific contingencies, and it therefore follows that, once he personally has ceased by death to be capable of incurring such losses or liabilities or of being affected by such contingencies, the policy comes to an end². This rule in principle applies where the insured is a company which ceases to exist by being dissolved³.

1 *Mildmay v Folgham* (1797) 3 Ves 471; *Doe d Pitt v Laming* (1814) 4 Camp 73; *Durrant v Friend* (1852) 5 De G & Sm 343. See, however, *Smith v Clerical Medical Life and General Life Assurance Society* [1992] 1 FCR 262, CA, where the plaintiff, as cohabitee of the deceased, was entitled, rather than his personal representatives, to the proceeds of a joint life assurance which was charged to a mortgagee and designed to be used as the fund for repayment of the mortgage. As to the devolution of property on death see generally EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 335 et seq. As to persons entitled to payment in the case of a life policy see PARAS 556-560 post.

2 For the principle that where a contract is founded on personal considerations the death of a party puts an end to the relationship see CONTRACT vol 9(1) (Reissue) PARAS 903, 1078; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 762. For the right of a personal representative of an insured to pay a premium on a life insurance if the insured dies after the due date for payment but before the expiry of the days of grace see PARA 167 post. A policy insuring persons driving a car with the owner's consent may benefit a person driving after the owner's death: *Kelly v Cornhill Insurance Co Ltd* [1964] 1 All ER 321, [1964] 1 WLR 158, HL.

3 As to the dissolution of companies see COMPANY AND PARTNERSHIP INSOLVENCY.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/153. Effect of bankruptcy of the insured.

153. Effect of bankruptcy of the insured.

The adjudication of the insured as a bankrupt does not affect the currency of an insurance policy in the absence of an express condition in the policy entitling the insurers to terminate it in that event¹. On the insured's bankruptcy his rights and interest under a policy normally vest in his trustee in bankruptcy². It seems that if the risk insured against is a risk personal to the insured, as for example in the case of a personal accident policy, any right to make a claim under the policy may remain with the bankrupt³.

1 For the principle that bankruptcy does not determine a contract see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 417.

2 See eg *Schondler v Wace* (1808) 1 Camp 487; *Marriage v Royal Exchange Assurance Co* (1849) 18 LJCh 216 (property insurance); *Manchester Fire Assurance Co v Wykes* (1875) 33 LT 142; *Leeming v Lady Murray* (1879) 13 ChD 123 (life assurance); *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186, CA. As to the vesting of property in a trustee in bankruptcy see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 390 et seq. However, the Third Parties (Rights against Insurers) Act 1930 provides that where the bankrupt is insured against liabilities to third parties and, either before or after the bankruptcy, any such liability is incurred, the rights of the bankrupt under the insurance in respect of the liability vest in the third party to whom the liability was incurred: see PARAS 679-684 post.

3 For the principle that rights of action which are personal to a bankrupt and do not relate directly to his property remain with him see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 435.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/154. Termination of policy by cancellation by the insured.

154. Termination of policy by cancellation by the insured.

Policies often contain a provision enabling the policy to be terminated by the insured on the giving of an appropriate notice of cancellation. It is usual in a continuous form of insurance, such as a life or endowment policy, to find a provision enabling the insured, after the expiration of a stipulated period of notice, to surrender the policy and receive the surrender value, if any¹. Other policies may contain a similar power, and in such a case there may be a provision for return of a proportionate part of the premium. If the power is exercised, the insurance comes to an end on the stipulated date, and any loss happening after the date of termination is not covered, even though the policy has not been formally cancelled or the appropriate surrender value paid².

An insured may have the right to cancel a policy within a specified time³.

¹ As to surrender value see PARA 553 post.

² *Ingram-Johnson v Century Insurance Co Ltd* 1909 SC 1032. As to return of the premium see PARAS 136-145 ante.

³ I.e. by rules made by the Financial Services Authority under the Financial Services and Markets Act 2000 ss 138, 139(4) and published by the Authority in the Financial Services Authority Handbook pursuant to s 153; see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 21-22, 27.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/155. Termination of policy by cancellation by the insurers.

155. Termination of policy by cancellation by the insurers.

The express terms of a policy may give the insurers power to determine the insurance on giving a stipulated notice¹. If such a power is exercisable at will, the insurers are not bound to give any reasons for exercising it². However, the insurance will not in any case expire until after expiration of the notice and repayment of the appropriate portion of the premium, if that is provided in the condition³.

1 As to termination of policy by cancellation by the insured see PARA 154 ante. In continuing forms of insurance such as life or endowment, it is usually inherent in the insurance that the insurers are bound to continue the insurance as long as the insured is prepared to go on paying the stipulated premium: see PARA 159 post.

2 *Sun Fire Office v Hart* (1889) 14 App Cas 98 at 104, PC.

3 *Bamberger v Commercial Credit Mutual Assurance Society* (1855) 15 CB 676 at 694 per Jervis CJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/156. Termination of policy by dissolution of insurance company.

156. Termination of policy by dissolution of insurance company.

Where the insurers are a company and go into liquidation the insured becomes entitled to claim in the liquidation for the value of the policy on the footing of a contingent claim¹. The insured is not a secured creditor, even though he has brought an action on the policy and leave to defend has been granted conditionally on payment into court of the amount claimed². Where an insurer³ goes into liquidation, the insured is entitled to prove for the value of the policy at the date of the liquidation as determined by the valuation rules made under the Insolvency Act 1986 and the Financial Services and Markets Act 2000⁴.

1 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 749.

2 *Harrison v Mortgage Insurance Corpn* (1893) 10 TLR 141, DC.

3 As defined in the Financial Services and Markets Act 2000 (Insolvency) (Definition of 'Insurer') Order 2001, SI 2001/2634.

4 I.e the Insurers (Winding Up) Rules 2001, SI 2001/3635 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 508. Under previous legislation it was held that, where the statutory provisions do not apply, the happening of a loss during the liquidation is admissible as evidence of the value of the policy and the insured may prove for the amount of his loss: see *Re Northern Counties of England Fire Insurance Co, Macfarlane's Claim* (1880) 17 ChD 337; limited by *Re Law Car and General Insurance Corpn* [1913] 2 Ch 103, CA, and *Re United Motor and General Insurance Co* (1925) 22 Ll L Rep 343.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(i) Period of Insurance/157. Death of individual underwriter.

157. Death of individual underwriter.

If a policy of insurance is underwritten in whole or in part by an individual underwriter his death has no effect on the obligations that he has undertaken. The contract is not a personal contract dependent on the exercise of personal skill on his part¹, but merely a contract to pay a sum of money on a contingency, and accordingly his estate is liable to the same extent as the underwriter was in his lifetime². At Lloyd's it is the normal practice on an underwriter's death for the other members of his syndicate to take over the share which he has underwritten³.

1 For the principle that where a contract is founded on personal considerations the death of a party puts an end to the relationship see CONTRACT vol 9(1) (Reissue) PARAS 903, 1078; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 762.

2 See *Warner Engineering Co Ltd v Brennan* (1913) 30 TLR 191, DC; *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA. As to termination of the contract by the death of the insured see PARA 152 ante.

3 As to the underwriting of business at Lloyd's see PARA 24 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(ii) Continuing Insurances/158. Basis of a continuing insurance.

(ii) Continuing Insurances

158. Basis of a continuing insurance.

In certain classes of insurance, notably life¹ and endowment insurance², it is fundamental to the contract that the insurance is to be operative up to the date of its maturity on the happening of the specified event, for example the death of the insured. There may, no doubt, be an insurance with reference to a stipulated life where there is a specified period for the insurance and an obligation on the insured to renew if further insurance is required. Thus an insurance taken out to provide against the contingency of the life insured terminating prior to a specified date (there being presumably a specific interest in the continued existence of the life insured up to that date) is to be regarded rather as a contingency insurance than a strict life insurance, the contingency being that life terminates before the specified date³. Normally the date of death is not a fundamental consideration in a life policy; what is important is to secure that provision is made for meeting obligations which arise after death, whenever death occurs. It seems to be inherent in a policy of this type that, even though the insurance has been expressed in periodical language, the insurers are obliged to continue the policy for the stipulated period unless there is some condition entitling them to determine it at some earlier date⁴.

1 As to life insurance see PARA 525 et seq post.

2 As to endowment insurance see PARAS 563-566 post.

3 As to contingency insurance, referred to as pecuniary loss insurance, see PARA 780 et seq post.

4 As to the duty of insurers to accept premiums see PARA 159 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(ii) Continuing Insurances/159. Insurers' duty to accept premiums.

159. Insurers' duty to accept premiums.

Where the consideration for life insurance is a premium payable periodically, with a provision that the policy is to be terminated on failure to pay any premium on the due date or within the days of grace¹, it seems the contract must properly be regarded as a continuing contract for the life of the insured subject to forfeiture on non-payment of any premium², rather than as an insurance for a period with a periodic right of renewal³. In any case the insurers are bound to accept the payment of the periodic premiums, if proffered by the insured by the due date or within the days of grace⁴, and to continue the insurance until the insured's death⁵, unless there is some provision in the contract entitling them to terminate the insurance before that date⁶. If any premium is not paid by the due date or within the days of grace, the policy terminates with effect from the date when payment was due⁷.

1 As to the days of grace see PARAS 166-167 post.

2 *Re Anchor Assurance Co* (1870) 5 Ch App 632 at 638 per Lord Hatherly LC; *Re Manchester and London Life Assurance and Loan Association* (1870) 5 Ch App 640 at 643 per Lord Hatherly LC; and see *Stuart v Freeman* [1903] 1 KB 47 at 55, CA, per Mathew LJ, where the policy was for at least a year, but was subject to forfeiture on non-payment of any quarterly premium. It seems that an endowment policy is also normally a continuing insurance.

3 For instances where a policy was regarded as an annual policy see *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622 at 643 per Willes J, approved in *Stuart v Freeman* [1903] 1 KB 47 at 57, CA, per Collins MR; *Phoenix Life Assurance Co v Sheridan* (1860) 8 HL Cas 745 at 750 per Lord Chelmsford.

4 As to the right of the personal representatives of the insured to pay if the insured dies within the days of grace see PARA 167 post.

5 *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622 at 643 per Willes J, approved in *Stuart v Freeman* [1903] 1 KB 47 at 52, CA, per Collins MR; *Honour v Equitable Life Assurance Society of the United States* [1900] 1 Ch 852 at 855.

6 See eg *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257, where it was provided that in every case when a new premium should become payable, the insurers should be at liberty to terminate the risk by refusing to accept the premium.

7 *Salvin v James* (1805) 6 East 571 at 582-583; *Acey v Fernie* (1840) 7 M & W 151; *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622; cf *McKenna v City Life Assurance Co* [1919] 2 KB 491 (power to revive policy by paying arrears of premium within 12 months from date on which last premium became due; premium became due for this purpose on specified date by which it was payable, not on last of the days of grace). If the policy money is paid in the belief that the policy has remained in effect, the money so paid can be recovered by the insurers as money paid by mistake: *Kelly v Solari* (1841) 9 M & W 54; see MISTAKE vol 77 (2010) PARA 69 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(ii) Continuing Insurances/160. Effect of changes of circumstances.

160. Effect of changes of circumstances.

Where, in the case of a life insurance, the insurers are under a duty to accept premiums, the duty continues to apply even though the life insured may have become more precarious¹. Indeed there is no obligation even to disclose to the insurers that such a change of circumstances has occurred². In insurance of this kind the insurers' rights in relation to misrepresentation and non-disclosure³ are governed by the state of affairs at the inception of the contract: if they can show that, at that stage, some material circumstance was misrepresented or not disclosed, they can repudiate even if successive premiums over years have been paid, unless, of course, they had waived their rights with full knowledge of the true facts⁴. If it is provided that a policy is to become void and the premiums are to be forfeited on breach of a condition subsequent, the provision for forfeiture applies to premiums paid after a breach has occurred but before discovery of the breach⁵, unless there is a waiver of the breach⁶.

1 As to the duty of the insurers to accept premiums see PARA 159 text and notes 4-6 ante.

2 As to the duty to make true representations before the contract is concluded see PARA 48 ante.

3 As to misrepresentation and non-disclosure see generally para 36 et seq ante.

4 Cf *Joel v Law Union and Grown Insurance Co* [1908] 2 KB 863, CA. As to waiver see PARA 112 ante.

5 *Sprenborg v Edinburgh Life Assurance Co* [1912] 1 KB 195. As to conditions subsequent see PARAS 97-98 ante.

6 *Wing v Harvey* (1854) 5 De GM & G 265.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iii) Renewal of Non-continuing Insurances/161. Basis of a non-continuing insurance.

(iii) Renewal of Non-continuing Insurances

161. Basis of a non-continuing insurance.

Many insurances are against the happening of a stipulated event, such as a fire, within a stipulated time, normally a year. Unless renewed¹, such a policy terminates on the expiration of the stipulated time, so that nothing is payable to the insured if the stipulated event does not occur within that time².

1 As to renewal by consent and conditions in policies as to renewal see PARAS 163-164 post.

2 *Tarleton v Staniforth* (1794) 5 Term Rep 695 (affd (1796) 1 Bos & P 471, Ex Ch); *Duffell v Wilson* (1808) 1 Camp 401; *Doe d Pitt v Shewin* (1811) 3 Camp 134; *Employers' Insurance Co of Great Britain v Benton* (1897) 24 R 908, Ct of Sess; *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444 (where the tenant was under a duty to insure against fire and the insurance policy was usually effected by the lessor, and the tenant unsuccessfully claimed against the lessor for failing to advise him that the policy had not been renewed). As to the recovery of money paid by insurers under a mistaken belief that a policy has remained in effect see PARA 159 note 7 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iii) Renewal of Non-continuing Insurances/162. Conditions for renewal by consent.

162. Conditions for renewal by consent.

It is inherent in any consensual renewal of an insurance policy that there has been no change in the identity of the parties: there must be the same insured¹ and insurers². The subject matter must also be unaltered in its identity³. Subject to these conditions, the acceptance of a renewal premium without objection is normally sufficient to establish a new contract for the renewal of the old bargain⁴ in the absence of any express stipulation in the policy covering renewal.

1 *Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17.

2 *Grover and Grover Ltd v Mathews* (1910) as reported in 79 LJB 1025 at 1029.

3 *Law Guarantee Trust and Accident Society Ltd v Munich Re-insurance Co* (1915) 31 TLR 572.

4 *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5 at 15 per Bramwell B; *Solvency Mutual Guarantee Co v York* (1858) 3 H & N 588.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iii) Renewal of Non-continuing Insurances/163. Conditions in policy as to renewal.

163. Conditions in policy as to renewal.

Most non-continuing policies of insurance contain conditions providing for the renewal of the insurance, but these are normally framed on the basis of mutual consent being required¹. A condition to this effect does not mean that the insurers are bound to accede to an application by the insured for renewal or to accept a premium tendered by the insured for renewal². An offer of renewal may come from the insurers, such as where they send out a renewal notice, and then payment of the appropriate premium amounts to acceptance of their offer so as to create a binding contract and there is no room for refusing to take the premium. If the renewal notice stipulates a higher rate of premium and the insured refuses to pay it, the offer has lapsed and cannot be revived later by the insured tendering the increased premium³. In any case there is no obligation on the insurers to send out a renewal notice⁴.

1 Cf *Jones Construction Co v Alliance Assurance Co Ltd* [1961] 1 Lloyd's Rep 121, CA (policy containing express self-extending provisions). As to renewal as a fresh contract see PARA 165 post.

2 *Tarleton v Staniforth* (1794) 5 Term Rep 695 (affd (1796) 1 Bos & P 471, Ex Ch), approved in *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257; *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900; *Webb and Hughes v Bracey* [1964] 1 Lloyd's Rep 465.

3 *Salvin v James* (1805) 6 East 571.

4 *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iii) Renewal of Non-continuing Insurances/164. Conditions obliging the insured to renew.

164. Conditions obliging the insured to renew.

In some rather special forms of insurance it may be made an express condition of the policy that the insured, no less than the insurers, is obliged to renew¹. In such a case there is no question of any bargaining or resiling at the renewal date; the insured is there and then legally liable to pay the premium which has then fallen due. The obligation to renew in such a case may extend over a fixed number of years² or it may attach indefinitely in the absence of notice to determine the insurance³.

1 As to where the insurers may be required to renew the policy see PARA 163 ante.

2 *Municipal Mutual Insurance v Pontefract Corp* (1917) 116 LT 671.

3 *Solvency Mutual Guarantee Co v York* (1858) 3 H & N 588; *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5; *Re Solvency Mutual Guarantee Society, Hawthorne's Case* (1862) 31 LJCh 625.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iii) Renewal of Non-continuing Insurances/165. Renewal as a fresh contract.

165. Renewal as a fresh contract.

Where the policy is renewable only by mutual consent, each renewal constitutes a fresh contract¹. Consequently, on each renewal the duty of disclosure reattaches², and the insured must disclose any facts which have become material during the preceding period of insurance³. In practice a fresh proposal is not used, but the original proposal is treated as if it were repeated on each renewal, and it is therefore the duty of the insured to correct any statements in the proposal which have since become inaccurate⁴. On the other hand, as on each renewal there is a fresh contract, it follows that a renewed policy is not liable to be avoided by a misstatement which would have avoided the original insurance if it has in fact become correct before the renewal⁵. A renewal takes effect on the same terms as the original policy unless there has been express agreement between the parties to vary those terms⁶.

1 *Stokell v Heywood* [1897] 1 Ch 459.

2 As to the duty to make disclosure see PARA 37 ante.

3 *Pim v Reid* (1843) 6 Man & G 1 at 25 per Cresswell J; *Law Accident Insurance Society v Boyd* 1942 SC 384. As to which facts are material see PARA 38 ante.

4 *Re Wilson and Scottish Insurance Corpn* [1920] 2 Ch 28; *Law Accident Insurance Society v Boyd* 1942 SC 384.

5 As to the effect of non-disclosure or misrepresentation see PARA 49 ante. The policy may contain an express stipulation to this effect.

6 *Great North Eastern Rly Ltd v Avon Insurance plc* [2001] EWCA Civ 780, [2001] 2 Lloyd's Rep 649, [2002] Lloyd's Rep IR 793; *Burrows v Jamaica Private Power Co Ltd* [2002] 1 All ER (Comm) 374, [2002] Lloyd's Rep IR 466.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iv) Days of Grace/166. Allowance of days of grace.

(iv) Days of Grace

166. Allowance of days of grace.

In the case of an insurance policy providing for avoidance in the event of non-payment of a periodical premium or of a premium for renewal, in the absence of any term in the policy relaxing the requirement, the policy lapses unless the premium is paid by the date prescribed by the policy¹. However, it is the usual practice in many classes of insurance, either by express stipulation or by the custom of the particular insurance business, to allow a period of grace after the expiration of the period of insurance for a renewal premium to be paid. In the case of life assurance it is usually laid down by express provision in the policy, and the period is generally 30 days. In other classes of insurance express stipulations as to days of grace are becoming more common².

1 See eg *Acey v Fernie* (1840) 7 M & W 151; *Phoenix Life Assurance Co v Sheridan* (1860) 8 HL Cas 745. As to the revival of policies see PARA 168 post.

2 See eg *Webb and Hughes v Bracey* [1964] 1 Lloyd's Rep 465 (solicitors' indemnity policy). In the case of motor insurance the provisions of the Road Traffic Act 1988 s 143(1) seem to exclude any period of grace, so far as compulsory insurance is concerned, unless it is added to the original period of insurance: see PARA 729 post.

UPDATE

166 Allowance of days of grace

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(iv) Days of Grace/167. Effect of tender of premium during days of grace.

167. Effect of tender of premium during days of grace.

If, by a stipulation in the policy, days of grace are allowed for payment of a premium for the continuance or renewal of the insurance, and the event insured against occurs before payment of the premium but within the days of grace, the rights of the parties depend on the nature and terms of the policy.

In the case of a policy of non-continuing insurance which is renewable only by consent¹, such as a fire policy, if the policy stipulates that no insurance is to be effective until the premium is paid, the insured cannot recover for a loss suffered during the days of grace but before payment of the premium even if he subsequently tenders payment within the days of grace². If, on the other hand, the policy incorporates a provision that the insured is to be covered during the days of grace³, the insurers cannot after the loss and before the days of grace have expired refuse to renew the insurance, and the insured is entitled to recover in respect of the loss if he tenders the premium before the days of grace have expired⁴. However, even in this case he is not entitled to recover if, before the due date for renewal and before the loss has occurred⁵, the insurers or the insured have indicated an intention not to renew the insurance⁶.

In the case of a policy of continuing insurance, such as life assurance, if the insurance is expressed to be for a specific period but the premiums are payable at intervals during the period, the established principle is that payment within the days of grace is equivalent to payment on the due date. If the insured dies within the days of grace and payment is subsequently tendered by his personal representatives or the persons entitled to the benefit of the policy, the insurance is effective and the insurers are not entitled to refuse to accept the payments⁷. This principle may not be applicable if the policy contains a term giving the insurers the right to terminate the insurance and does not contain any provisions restricting the exercise of the right during the days of grace⁸, or if it is clear that the policy contemplates payment of premiums only by the insured personally while alive⁹.

In all classes of insurance, if a loss occurs during the period of grace the insured or his personal representatives cannot recover unless the premium is paid before the days of grace expire¹⁰.

1 As to the renewal of policies of non-continuing insurance see PARAS 161-165 ante.

2 *Tarleton v Staniforth* (1794) 5 Term Rep 695 (affd (1796) Bos & P 471, Ex Ch); *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257 at 296-299. As to the effect of a renewal notice see PARA 166 text to note 2 ante.

3 A provision that any payment of premium made within the period of grace is to be treated as having been paid on the due date would, it is thought, have this effect.

4 *Salvin v James* (1805) 6 East 571 at 581-582; *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257 at 296-299.

5 Possibly notice of an intention not to renew given by the insurers after the due date for renewal but before the loss occurred may be sufficient: *Salvin v James* (1805) 6 East 571 at 581-582.

6 *Salvin v James* (1805) 6 East 571.

7 See *Stuart v Freeman* [1903] 1 KB 47 at 55, CA, per Mathew LJ; *McKenna v City Life Assurance Co* [1919] 2 KB 491 at 497 per Scrutton LJ.

8 See *Simpson v Accidental Death Insurance Co* (1857) 2 CBNS 257.

9 *Want v Blunt* (1810) 12 East 183; *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622 at 642-644 per Willes J. For criticism of the dicta in the latter case see *Stuart v Freeman* [1903] 1 KB 47 at 55, CA, per Mathew LJ. In *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* supra, the effect of a payment during the days of grace was not directly in issue, since the payment was tendered after the expiration of the days of grace and the question was whether it was effective to revive the policy under a provision contained in the policy as to revival. As to the revival of policies see generally para 168 post.

10 See eg *Salvin v James* (1805) 6 East 571 at 582-583; and see PARA 166 ante. Under some forms of stipulation formerly in use the days of grace were added to the original period of insurance, so that a loss happening during the days of grace fell within the original policy: *Doe d Pitt v Shewin* (1811) 3 Camp 134; *McDonnell v Carr* (1833) Hayes & Jo 256. See also note 9 supra; and PARA 168 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(v) Revival of Policy/168. Revival of lapsed policy.

(v) Revival of Policy

168. Revival of lapsed policy.

An insurance policy may lapse for a number of reasons, but the most usual ones are the insured's failure to pay the consideration due from him in the form of premium on the due date or within the period of grace allowed¹, or his failure to renew the policy². However, there may be a revival of a policy which has so lapsed, either by agreement between the parties or by conduct of the insurers such as to estop them from denying that there is a subsisting policy³.

1 See eg *Webb and Hughes v Bracey* [1964] 1 Lloyd's Rep 465. As to days of grace see PARAS 166-167 ante.

2 See eg *Commercial Union Assurance plc v Sun Alliance Insurance Group plc* [1992] 1 Lloyd's Rep 475 (reinsurance).

3 *Handler v Mutual Reserve Fund Life Association* (1904) 90 LT 192 at 194, CA, per Mathew LJ; see also *Acey v Fernie* (1840) 7 M & W 151; *Edge v Duke* (1849) 18 LJCh 183; *Kirkpatrick v South Australian Insurance Co* (1886) 11 App Cas 177, PC. As to estoppel see PARA 113 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(8) DURATION OF THE POLICY/(v) Revival of Policy/169. Revival as new contract.

169. Revival as new contract.

A revival of an insurance policy¹ operates as a new contract, and the parties' rights and liabilities, according to ordinary principles, do not begin until the new contract has started to run. Even if the revived policy is antedated to the expiration of the period previously covered, this does not necessarily mean that a loss which has happened before the date of the revival has to be paid for by the insurers²; to achieve this there must be clear evidence of the parties having intended to make the revival retrospective so as to cover even interim losses³. There may therefore be a considerable difference in effect between a premium paid before the expiration of the period of grace, which the insurers may have to accept even if a loss has already occurred⁴, and a premium paid after the expiration of that period, which will not commit the insurers to accepting a loss which has already occurred, unless it is clearly their intention, expressly or impliedly, to do so. However, they may make it plain that they are content to agree to a retrospective revival of the policy regardless of whether a loss has, in the meantime, occurred or not⁵. It is not unusual to find that fresh terms and conditions are laid down for the revival⁶ and there is then no effective revival until the new terms and conditions are accepted and complied with⁷.

1 As to the revival of a lapsed policy see PARA 168 ante.

2 *Doe d Pitt v Shewin* (1811) 3 Camp 134; *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622.

3 *Pritchard v Merchant's and Tradesmen's Mutual Life Assurance Society* (1858) 3 CBNS 622 at 645 per Byles J.

4 As to the circumstances in which insurers are bound to accept a premium paid before the expiration of the days of grace see PARAS 166-167 ante.

5 It would not appear to be legitimate to infer such intent if the intervening loss was total so as to obliterate the entirety of the insurable interest: see PARA 2 ante.

6 Cf *Windus v Lord Tredegar* (1866) 15 LT 108, HL. The original policy may contain a condition prescribing the terms on which it may be revived.

7 *Handler v Mutual Reserve Fund Life Association* (1904) 90 LT 192, CA. However, if the original contract laid down the basis on which, in the event of revival being desired, the insurers would grant this, it is doubtful whether the insurers can add further terms and conditions if and when revival is desired.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(i) Claims generally/170. Duties imposed on insured.

(9) CLAIMS UNDER POLICIES

(i) Claims generally

170. Duties imposed on insured.

Insurers are peculiarly exposed to unfounded or exaggerated claims, and it is therefore necessary for their protection that, whenever a claim under a policy is likely to arise, they should have the earliest opportunity of inquiring into the circumstances of the loss whilst the facts are recent and evidence can be more easily obtained¹. Consequently, policies usually contain stipulations imposing on the insured certain specific duties, such as giving notice of his loss to the insurers², making a formal claim with particulars and proofs³ and giving such information as may reasonably be required⁴. These duties are contractual, and both the performance and the consequences of non-performance are regulated by the terms of the particular stipulation employed⁵.

1 *Worsley v Wood* (1796) 6 Term Rep 710 at 718 per Lord Kenyon CJ; *Mason v Harvey* (1853) 8 Exch 819 at 821 per Pollock CB; *Gamble v Accident Assurance Co* (1869) IR 4 CL 204 at 214 per Pigot CB; *Hiddle v National Fire and Marine Insurance Co of New Zealand* [1896] AC 372 at 376, PC.

2 As to notice of loss see PARAS 172-174 post.

3 As to particulars and proof of loss see PARAS 175-180 post.

4 *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA. As to requiring further information see PARA 180 post.

5 *Ward v Law Property Assurance and Trust Society* (1856) 4 WR 605; *Wilkinson v Car and General Insurance Corp Ltd* (1914) 110 LT 468; *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(i) Claims generally/171. Failure to perform duties.

171. Failure to perform duties.

Where a stipulation in an insurance policy fixes a time within which a duty is to be performed¹, the words used may not be sufficient to make a failure to perform the duty fatal to the enforcement of the claim². As a general rule the stipulation is expressed as a condition precedent to recovery³, and no claim is maintainable unless the duty is performed in accordance with the terms of the stipulation⁴. The fact that the failure was due to circumstances beyond the claimant's control is immaterial⁵. A failure to perform the duty may be waived⁶ and the insured may be relieved, either expressly or by the conduct of the insurers, from his obligation to perform it⁷.

1 If no time is fixed, the duty may be performed at any time before the claim is statute-barred: *Harvey v Ocean Accident and Guarantee Corpn* [1905] 2 IR 1, CA.

2 *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237 at 239 per Mathew J. In this case, the remedy for breach is an action for damages: *Re Coleman's Depositories Ltd and Life and Health Assurance Association* [1907] 2 KB 798, CA. A stipulation which, after fixing a time for the performance of the duty, provided that no claim was to be payable until the duty was performed, was held in Ireland not to be a condition precedent: *Weir v Northern Counties of England Insurance Co* (1879) 4 LR Ir 689 at 692; cf *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA.

3 *Roper v Lendon* (1859) 1 E & E 825, approved in *Elliott v Royal Exchange Assurance Co* (1867) LR 2 Exch 237; *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA. See also *Whyte v Western Assurance Co* (circa 1876) referred to in *Moore v Harris* (1876) 1 App Cas 318 at 330, PC, and reported in 22 LCJ 215, PC; and cf *Ralston v Bignold* (1853) 22 LTOS 106. The fact that breach of a condition precedent by the insured gives the insurers the right to refuse payment even though the breach is trivial has led to the modern tendency by the courts of not treating a claims provision as a condition precedent unless it expressly or impliedly so provides: *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 All ER (Comm) 545, [2000] Lloyd's Rep IR 352, CA; *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563. As to conditions precedent to recovery see PARA 96 ante.

4 *Roper v Lendon* (1859) 1 E & E 825; *Cawley v National Employers' Accident and General Assurance Association Ltd* (1885) 1 TLR 255; *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 51 WR 222.

5 *Oldman v Bewicke* (1786) 2 Hy Bl 577n; *Routledge v Burrell* (1789) 1 Hy Bl 254; *Worsley v Wood* (1796) 6 Term Rep 710; *Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd* (1885) 1 TLR 495; *Gamble v Accident Assurance Co* (1869) IR 4 CL 204, followed in *Patton v Employers' Liability Assurance Corpn* (1887) 20 LR Ir 93. The position may be different where a condition is, from its very nature, impossible to perform: see PARA 109 ante.

6 See eg *Webster v General Accident Fire and Life Assurance Corpn Ltd* [1953] 1 QB 520, [1953] 1 All ER 663. As to waiver see PARA 112 ante.

7 *Toronto Rly Co v National British and Irish Millers Insurance Co Ltd* (1914) 111 LT 555, CA; *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541, PC; and see *Donnison v Employers' Accident and Live Stock Insurance Co* (1897) 24 R 681, Ct of Sess.

UPDATE

171 Failure to perform duties

NOTE 3--See *Friends Provident Life & Pensions Ltd v Sirius International Insurance* [2005] EWCA Civ 601, [2005] 2 All ER (Comm) 145 (clause requiring notice of event

likely to lead to claim could be innominate term), applied in *Ronson International Ltd v Patrick (Royal London Mutual Insurance Society Ltd, Pt 20 defendant)* [2006] EWCA Civ 421, [2006] 2 All ER (Comm) 344.

NOTE 7--Repudiation of liability by the insurer under a claim did not relieve the insured of obligations under the policy unless the words justified inference of a waiver: *Nasser Diab v Regent Insurance Co Ltd* [2006] UKPC 29, [2006] 2 All ER (Comm) 704.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(ii) Notice of Loss/172. Time for giving notice of loss.

(ii) Notice of Loss

172. Time for giving notice of loss.

The insured is usually required by a stipulation in the policy to give notice of any loss. The stipulation in ordinary use requires the notice to be given 'immediately' or 'forthwith'; the effect of this is that the notice must be given within a reasonable time¹. Failure by the insured to comply with such a stipulation may result in the insurer being able to reject the claim, depending on the construction of the provision and the consequences of the breach for the insurer². If a stipulation excludes liability for a loss not notified within a specified time from its occurrence, as distinct from a specified time from its discovery, the insured cannot recover for losses which without his knowledge occurred earlier than the period covered by the time limit³. Unless required by the terms of the stipulation, the notice need not be in writing⁴.

1 *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 51 WR 222; *Verelst's Administratrix v Motor Union Insurance Co Ltd* [1925] 2 KB 137; *Webster v General Accident Fire and Life Assurance Corp'n Ltd* [1953] 1 QB 520, [1953] 1 All ER 663; *Forney v Dominion Insurance Co Ltd* [1969] 3 All ER 831, [1969] 1 WLR 928; *Farrell v Federated Employers' Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Monkfield v Vehicle and General Insurance Co Ltd* [1971] 1 Lloyd's Rep 139; *Hadenfayre Ltd v British National Insurance Society Ltd* [1984] 2 Lloyd's Rep 393.

2 *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 All ER (Comm) 545, [2000] Lloyd's Rep IR 352, CA.

3 *T H Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd* [1953] 2 Lloyd's Rep 355.

4 *Re Solvency Mutual Guarantee Society, Hawthorn's Case* (1862) 31 LJCh 625.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(ii) Notice of Loss/173. Personal notice unnecessary.

173. Personal notice unnecessary.

Except where the stipulation otherwise provides, the notice need not be given by the insured personally¹; it may be given by an agent² or any person purporting to act on behalf of the insured³. Similarly, the notice need not be given to the insurers personally, but may be given to an agent having authority to receive it on their behalf; an apparent authority is sufficient⁴. Where the policy was negotiated through the insurers' agent the insured may be entitled to assume that the agent's authority to represent the insurers continues; if so, notice to the agent binds the insurers⁵, even though, without the knowledge of the insured, the agent has ceased to represent them⁶. However, by the terms of the stipulation the notice may have to be given to the insurers at their head office or any branch office⁷. In this case, notice to the agent who negotiated the insurance is not in itself sufficient⁸, but will be effective if it is transmitted by the agent to the office and received there within the proper time⁹.

1 In the case of the death of the insured, notice need not be given by his personal representatives: *Patton v Employers' Liability Assurance Corpn* (1887) 20 LR Ir 93.

2 *Davies v National Fire and Marine Insurance Co of New Zealand* [1891] AC 485 at 489, PC.

3 *Patton v Employers' Liability Assurance Corpn* (1887) 20 LR Ir 93 at 100 per Murphy J.

4 As to apparent authority see generally AGENCY vol 1 (2008) PARAS 37-44, 122-124.

5 *Gale v Lewis* (1846) 9 QB 730.

6 *Marsden v City and County Assurance Co* (1865) LR 1 CP 232.

7 For an example of such a stipulation see *Brook v Trafalgar Insurance Co Ltd* (1946) 79 Ll L Rep 365, CA.

8 *Re Williams and Lancashire and Yorkshire Accident Insurance Co's Arbitration* (1902) 51 WR 222.

9 *Shiells v Scottish Assurance Corpn* (1889) 16 R 1014, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(ii) Notice of Loss/174. Notice of claims by third parties.

174. Notice of claims by third parties.

Where the insurance is against liability to third parties, in addition to the notice of the accident giving rise to liability¹, the insured is usually required to give notice to the insurers of any claim made upon him by a third party².

1 There is no need to give notice of all accidents unless they are clearly ones to which the policy applies: *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233. As to notice of loss see PARA 172 ante.

2 *Farrell v Federated Employers Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Berliner Motor Corp v Sun Alliance and London Insurance Ltd* [1983] 1 Lloyd's Rep 320; *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association* [1985] 2 All ER 395, [1985] 1 Lloyd's Rep 274; *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep 7, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/175. Form of claim.

(iii) Particulars and Proofs of Loss

175. Form of claim.

The insured is usually required by a stipulation in the policy to make a formal claim upon the insurers, containing full particulars of the loss, and to deliver proofs supporting it. In practice the claim is made on a printed form supplied by the insurers and indicating the nature of the particulars required¹. The giving of proper particulars and proofs is usually made a condition precedent to any right of recovery for the loss². The duty of good faith applies to the making of claims³.

1 As to fraudulent claims see PARAS 181-182 post.

2 *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA; and see PARA 96 ante.

3 *Manifest Shipping Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 Lloyd's Rep 389. As to the continuing duty of good faith see PARA 45 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/176. Particulars required.

176. Particulars required.

The particulars required necessarily vary according to the nature of the insurance. They must be furnished with such details as are reasonably practicable¹. Whether the details given are sufficient or not is a question of degree, depending partly upon the materials available which, especially in the case of a fire, may be scanty, and partly upon the time within which they have to be furnished. In any case, the insured has not performed his duty adequately unless he has furnished the best particulars which the circumstances permit².

1 *Mason v Harvey* (1853) 8 Exch 819 at 820 per Pollock CB.

2 *Hiddle v National Fire and Marine Insurance Co of New Zealand* [1896] AC 372 at 375, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/177. Proofs of loss.

177. Proofs of loss.

Proofs of loss are necessarily documentary proofs; the loss may be proved by any satisfactory evidence¹. In requiring proofs or in deciding as to their sufficiency, the insurers must not act capriciously; they must be satisfied with such proofs as would satisfy reasonable men². In certain cases strict proof may be required³. The insured may be required to verify the claim by a statutory declaration⁴. The insurers may appoint a loss adjuster to assist them in dealing with the insured's claim⁵.

1 A statement in the proposal as to the method of proving the loss does not preclude the insured from proving the loss by another method: *Winicofsky v Army and Navy General Assurance Association* (1919) 35 TLR 283.

2 *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782. See also *Moore v Woolsey* (1854) 4 E & B 243; *London Guarantie Co v Fearnley* (1880) 5 App Cas 911, HL; *Napier v UNUM Ltd (formerly NEL Permanent Health Insurance Ltd)* [1996] 2 Lloyd's Rep 550. Non-performance of a condition of this kind may be a defence available to the insurers, but it does not preclude the insured from taking proceedings to enforce the policy: *Braunstein v Accidental Death Insurance Co* supra; cf *Cowell v Yorkshire Provident Life Assurance Co* (1901) 17 TLR 452.

3 *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425, CA (strict proof required of burglary); *Atlantic Metal Co Ltd v Hepburn* [1960] 2 Lloyd's Rep 42 (strict proof required of loss of metal stored in warehouse).

4 *Watts v Simmons* (1924) 18 Ll L Rep 177. As to statutory declarations see the Statutory Declarations Act 1835 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 1024.

5 As to the role of the loss adjuster see *Kitchen Design and Advice Ltd v Lea Valley Water Co* [1989] 2 Lloyd's Rep 221 at 222, where the judge set out the loss adjuster's affidavit as to his responsibilities.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/178. Time prescribed.

178. Time prescribed.

The stipulation as to particulars and proofs of loss¹ in practice prescribes a time within which the particulars and proofs are to be delivered. Generally, delivery within the prescribed time is made a condition precedent to the recovery by the insured², and the insurers are absolved from liability by a failure to deliver the particulars or proofs within the prescribed time³. The insurers may, however, extend the time; this does not set time at large, but the extension is exhausted as soon as the object for which it was granted, such as, for instance, the working out of figures, has been attained⁴.

1 As to the particulars and proofs required see PARAS 176-177 ante.

2 As to conditions affecting recovery see PARA 98 ante.

3 *T H Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd* [1953] 2 Lloyd's Rep 355.

4 *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186, CA.

UPDATE

178 Time prescribed

TEXT AND NOTES--The information must be provided in good time, regardless of whether the insurer would be prejudiced or not by the failure co-operate: *Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation)* [2006] EWCA Civ 939, [2006] 2 All ER (Comm) 982.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/179. Amendment of claim.

179. Amendment of claim.

Notwithstanding the delivery of particulars and proofs¹, the insured is not precluded, in the absence of any stipulation to the contrary, from amending his claim and increasing the amount claimed in respect of his loss². Unless precluded by the terms of payment, he may, even after the claim has been paid, make a fresh claim in respect of further loss³.

1 As to delivery of particulars and proofs see PARA 178 ante.

2 *Mason v Harvey* (1853) 8 Exch 819 at 820 per Pollock CB; and see *Vance v Forster* (1841) 1R Cir Rep 47.

3 *Prosser v Lancashire and Yorkshire Accident Insurance Co Ltd* (1890) 6 TLR 285, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iii) Particulars and Proofs of Loss/180. Requiring further information.

180. Requiring further information.

Notwithstanding that proper particulars and proofs¹ have been given, the insurers may in the course of their investigations come upon other matters which they wish to examine, such as bank accounts, sales ledgers and business books generally. Therefore, there is often a condition that such further information as may reasonably be required must be given². Failure to perform this condition, if it is a condition precedent to recovery, will relieve the insurers from liability for a loss, however genuine³.

1 As to the particulars and proofs required see PARAS 176-177 ante.

2 *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA.

3 *Welch v Royal Exchange Assurance* [1939] 1 KB 294, [1938] 4 All ER 289, CA; and see PARA 98 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iv) Fraudulent Claims/181. Effect of fraudulent claim.

(iv) Fraudulent Claims

181. Effect of fraudulent claim.

An insured who makes a fraudulent claim forfeits all benefit under the policy, whether it contains an express condition to that effect or not¹. However a fraudulent claim is not a breach of the continuing duty of utmost good faith, and the insurers do not have the right to treat the policy as void ab initio: at most they have the right to treat the policy as terminated for breach, or possibly only to refuse to pay the particular claim tainted by the fraud². Policies of non-marine insurance usually contain an express condition against fraudulent claims³. The insurers are not entitled to recover as damages the expenses incurred in investigating a fraudulent claim⁴. The burden of proof is on the party alleging the fraudulent conduct, usually the insurer⁵.

1 *Britton v Royal Insurance Co* (1866) 4 F & F 905 at 909 per Willes J. See also *Thurtell v Beaumont* (1824) 8 Moore CP 612; *Goulstone v Royal Insurance Co* (1858) 1 F & F 276 at 279 per Pollock CB; *Orakpo v Barclays Insurance Services* [1995] LRLR 443, CA. As to the duty of good faith see PARAS 36, 45 ante.

2 *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563; *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 1 All ER (Comm) 714, [2002] 3 WLR 616.

3 Such a condition is used even in an ordinary Lloyd's policy: see *Lek v Mathews* (1927) 29 Ll L Rep 141; *Nsubuga v Commercial Union Assurance Co Ltd* [1998] 2 Lloyd's Rep 682. Forgery of an insurance policy, an assignment of it or an indorsement on it, with intent to defraud, is an offence: see the Forgery and Counterfeiting Act 1981; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 346-350.

4 *London Assurance v Clare* (1937) 57 Ll L Rep 254 at 270 per Goddard J.

5 Eg see *Nsubuga v Commercial Union Assurance Co Ltd* [1998] 2 Lloyd's Rep 682; *McGregor v Prudential Insurance Co Ltd* [1998] 1 Lloyd's Rep 112.

UPDATE

181 Effect of fraudulent claim

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--An insured should not have the settled expectation that, even if the fraud fails, he will lose nothing, there being no obvious reason why the consequences of making a fraudulent claim should depend on the timing of any payment in respect of any genuine part of the claim: *Axa General Insurance v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(iv) Fraudulent Claims/182. What claims are fraudulent.

182. What claims are fraudulent.

A claim is fraudulent if: the insured has suffered no loss¹ or has brought about his own loss; the claim is supported by the use of fraudulent means or devices²; or the insured has deliberately suppressed a defence which would otherwise be open to the insurers³. The position is not so clear where the claim is for an amount in excess of the real amount of the loss and the charge of fraud is based upon the suggestion that the claim has been fraudulently exaggerated. The mere fact that the insured has claimed an excessive amount is not necessarily proof of fraud; questions of amount are largely matters of opinion and the insured may have honestly overestimated the value of his property or the amount of his loss⁴. The excess may be so great as to justify the conclusion that, having regard to the circumstances, the exaggeration of the amount cannot be an honest estimate but must have been intended to deceive the insurers and to induce them to pay a larger sum than is properly payable; in this case the exaggeration is fraudulent⁵. An exaggeration of amount may also be classified as fraudulent where the insured puts forward deliberately exaggerated figures, not for the purpose of inducing the insurers to pay the full amount of the claim, but for the purpose of fixing a basis upon which to negotiate a settlement⁶. A claim will also be fraudulent if the insured, having made a genuine claim, subsequently discovers that he had not suffered any loss or that the amount of loss was significantly smaller than was originally thought, but has proceeded with the full amount of the claim⁷. However, very clear evidence of fraud will be required and the court will pay regard to the reality of commercial negotiation⁸. Fraud in relation to part of a claim will cause the whole claim to fail⁹, and the claimant is not entitled to recover that part of the claim to which the fraud does not apply¹⁰. Any fraud by the insured after proceedings have commenced does not amount to a fraudulent claim, and such fraud is to be dealt with by the court or the arbitrator, as the case may be, as breach of the relevant procedural rules¹¹.

1 *Britton v Royal Insurance Co* (1866) 4 F & F 905; *Herman v Phoenix Assurance Co Ltd* (1928) 18 LI L Rep 371, CA.

2 *R v Boynes* (1843) 1 Car & Kir 65; *Herbert v Poland* (1932) 44 LI L Rep 139; *Shoot v Hill* (1936) 55 LI L Rep 29.

3 *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 1 All ER (Comm) 714, [2002] 3 WLR 616.

4 *Chapman v Pole, PO* (1870) 22 LT 306; *London Assurance v Clare* (1937) 57 LI L Rep 254.

5 *Worsley v Wood* (1796) 6 Term Rep 710 at 718; *Levy v Baillie* (1831) 7 Bing 349; *Goulstone v Royal Insurance Co* (1858) 1 F & F 276; *Chapman v Pole, P O* (1870) 22 LT 306; *Beauchamp v Faber* (1898) 3 Com Cas 308; *Orakpo v Barclays Insurance Services* [1995] LRLR 443, CA; *Baghbadrani v Commercial Union Assurance Co plc* [2000] Lloyd's Rep IR 94.

6 *Norton v Royal Fire and Life Assurance Co* (1885) Times, 12 August, CA, revsg (1885) 1 TLR 460.

7 *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 1 All ER (Comm) 714, [2002] 3 WLR 616.

8 *Orakpo v Barclays Insurance Services* [1995] LRLR 443, CA; *Nsubuga v Commercial Union Assurance Co Ltd* [1998] 2 Lloyd's Rep 682.

9 *Nsubuga v Commercial Union Assurance Co Ltd* [1998] 2 Lloyd's Rep 682.

10 *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209, CA; *Direct Line Insurance plc v Khan* [2001] EWCA Civ 546, [2002] Lloyd's Rep IR 364.

11 *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 1 All ER (Comm) 714, [2002] 3 WLR 616.

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NOTE 9--See, however, *Direct Line Insurance plc v Fox* [2009] EWHC 386 (QB), [2009] 1 All ER (Comm) 1017 (dishonest attempt to assert that condition precedent necessary for final payment had been satisfied did not result in an order to repay all sums previously paid).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(v) Unenforceable Claims/183. Public policy.

(v) Unenforceable Claims

183. Public policy.

Claims may be unenforceable on the ground that to enforce them would be against public policy. If, for example, items have been brought into the country without customs duty being paid on them and they are subsequently insured against loss, the insurers are under no liability to indemnify the insured if they are stolen¹. However, where to avoid tax the value of items subsequently stolen is understated on an invoice but the insured party derives no benefit from the understatement, the understatement in no way contributes to the loss and the value of the items had been correctly stated to the insurer, it is not against public policy to enforce the insured party's claim². Public policy precludes a claim in respect of an accident arising from threatening violence with a loaded shotgun³, or from a deliberate running down by a motor vehicle⁴.

1 *Geismar v Sun Alliance and London Insurance Ltd* [1978] QB 383, [1977] 3 All ER 570.

2 *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA.

3 *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA.

4 *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(v) Unenforceable Claims/184. Limitation of actions.

184. Limitation of actions.

Proceedings founded on a contract of insurance cannot be brought after the expiration of six years from the date on which the cause of action accrued¹, except in the case of a contract under seal when the period is twelve years from the date on which the cause of action accrued². Where the proceedings are based upon the fraud of the defendant, or any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant, or the proceedings are for relief from the consequences of a mistake, the period of limitation does not begin to run until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it³.

For the purposes of determining the date at which a cause of action accrued, there is in general a distinction to be drawn between policies of liability insurance on the one hand and all other types of insurance on the other. The cause of action does not accrue under a liability policy until the liability of the insured is established by judgment, arbitration or binding settlement⁴. However, in respect of other types of insurance, in the absence of policy terms affecting the matter, the limitation period begins to run as soon as the insured event occurs, even though no claim has been made. This is because an insurance contract is to be construed as insurance against the occurrence of an insured event, and the occurrence of that event is treated as equivalent to a breach of contract by the insurer⁵. In reinsurance the cause of action arises when the underlying liability is ascertained by agreement, by award or by judgment; it is not postponed until the rendering of an account⁶.

The Limitation Act 1980 does not, in contract claims, extinguish the cause of action but merely gives the insurers a defence. Accordingly, the insurers may choose not to rely upon the defence or may contract out of doing so by means of a 'standstill' agreement. Further, the right to rely upon a limitation defence may be lost by reason of waiver or estoppel⁷.

1 Limitation Act 1980 s 5.

2 Ibid s 8(1); and see LIMITATION PERIODS.

3 Ibid s 32(1); and see LIMITATION PERIODS.

4 *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, [1989] 2 WLR 568, HL. As to liability insurance see PARA 660 et seq.

5 *Virk v Gan Life Holdings plc* (1999) 52 BMLR 207, [2000] Lloyd's Rep IR 159, CA, in which the court found the limitation period to be extended by a condition precedent in the policy; *Universities Superannuation Scheme Ltd v Royal Insurance (UK) Ltd* [2000] 1 All ER (Comm) 266, [2000] Lloyd's Rep IR 524.

6 *Halvanon Insurance Co Ltd v Cia de Seguros do Estado de Sao Paulo* [1995] LRLR 303, CA. As to the limitation of actions relating to reinsurance see PARA 779 post.

7 *Seechurn v Ace Insurance Sa-Nv (formerly Cigna Insurance Co of Europe Sa-Nv)* [2002] EWCA Civ 67, [2002] 2 Lloyd's Rep 390, [2002] Lloyd's Rep IR 489. As to waiver and estoppel see PARAS 112-113 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vi) Settlement of Disputed Claims/185. Arbitration clauses.

(vi) Settlement of Disputed Claims

185. Arbitration clauses.

A policy of non-marine insurance usually contains an arbitration clause providing for the reference to arbitration of disputes arising under the policy¹. This constitutes a valid submission to arbitration which, even though not signed by him, is binding on the insured².

¹ For a full treatment of arbitration law see ARBITRATION. Members of the Association of British Insurers and Lloyd's do not usually insist on the enforcement of an arbitration clause on a question of liability as distinct from mere quantum if the insured seeks to take the matter to court: see PARA 1 text and note 3 ante. As to ouster of the court's jurisdiction see ARBITRATION vol 2 (2008) PARAS 1222-1224.

² *Baker v Yorkshire Fire and Life Assurance Co* [1892] 1 QB 144.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vi) Settlement of Disputed Claims/186. Scope of arbitration clauses.

186. Scope of arbitration clauses.

Arbitration clauses vary in their scope¹. Such a clause may deal with questions of amount only² or may extend to the question of liability³. The widest form of clause empowers the arbitrator to determine all matters in dispute between the parties, and this extends to ancillary matters, eg restitution and tort claims. More usually, the clause is limited to all disputes which may arise under the policy. Under this form the arbitrator is empowered to decide all questions of construction and all other legal questions⁴ and, unless expressly excluded by the terms of the clause, the arbitrator's jurisdiction extends even to charges of fraud in relation to the claim⁵. However, an arbitration clause limited to disputes arising under the contract limits the arbitrator to deciding disputes arising under the policy; he has no power to deal with disputes arising outside it. He cannot deal with a claim for a return of premium where the claim is founded upon the invalidity of the policy⁶, nor enforce a compromise of a disputed claim⁷. Such an arbitration clause does not extend to a claim by the insured for a breach of a common law duty on the part of the insurers⁸.

An arbitration clause which is suitably worded will extend to a dispute as to whether the contract was ever entered into at all or whether the apparent contract was vitiated at the outset by reason of illegality, duress or essential error. The same principle applies if the question in dispute is whether the contract is capable of being and has been validly avoided ab initio on the ground of fraud, misrepresentation or non-disclosure. While in these cases the crucial question in issue is whether the insurance contract exists at all, it is settled that the arbitration clause is a distinct undertaking⁹ and also that the arbitrators have the necessary competence to determine their own jurisdiction¹⁰ subject to the right of the objecting party either to seek relief pending the outcome of the award or to appeal against the award on jurisdictional grounds once it has been made¹¹. In the same way, if either party brings an action in breach of the arbitration clause, the court is required to stay its own proceedings unless it is satisfied that the arbitration clause is null and void, inoperative or incapable of being performed¹².

1 Arbitration clauses must be distinguished from clauses providing for a valuation: see *Sutherland v Sun Fire Office* (1852) 14 Dunt 775, Ct of Sess; *Toronto Rly Co v National British and Millers Insurance Co Ltd* (1914) 111 LT 555, CA; and cf *Hadwin v Lovelace* (1809) 1 Act 126, PC

2 *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782; *Elliott v Royal Exchange Assurance Co* (1867) LR 2 Exch 237; *Viney v Bignold* (1887) 20 QBD 172; *Caledonian Insurance Co v Gilmour* [1893] AC 85, HL. Even though the arbitrator in such a case has no jurisdiction to determine any other questions (*O'Connor v Norwich Union Life and Fire Insurance Society* [1894] 2 IR 723), the insurers may be precluded from objecting to his jurisdiction if the other questions were raised before the insurers obtained a stay of proceedings (*South British Insurance Co v Gauci Bros & Co* [1928] AC 352, PC).

3 *Trainor v Phoenix Fire Assurance Co* (1891) 65 LT 825.

4 Eg questions of insurable interest: *Macaurea v Northern Assurance Co* [1925] AC 619, HL. Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties: Arbitration Act 1996 s 45(1).

5 *Trainor v Phoenix Fire Assurance Co* (1891) 65 LT 825; *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433, DC.

6 *London, Edinburgh and Glasgow Assurance Co Ltd v Partington* (1903) 88 LT 732, DC.

7 *Taylor v Warden Insurance Co* (1933) 45 Ll L Rep 218, CA.

8 *Northern Publishing Office (Belfast) Ltd v Cornhill Insurance Co Ltd and Ellis* [1956] NI 157 (insurance against third party liability arising from use of lift; insurers periodically to examine and report on lift; claim by insured against insurers in respect of damage to lift alleged to arise from negligence in examination and in furnishing reports).

9 See Arbitration Act 1996 s 7.

10 See *ibid* s 30.

11 See *ibid* s 67.

12 See *ibid* s 9.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vi) Settlement of Disputed Claims/187. Effect of arbitration clause on right of action.

187. Effect of arbitration clause on right of action.

An arbitration clause¹ does not necessarily preclude the insured from bringing an action to enforce his claim. The clause may be nothing more than a collateral term of the contract between the parties by which a tribunal for determining disputes is provided². In this case there is a complete cause of action before the clause becomes operative³, and if the insured brings proceedings the insurers are not relieved from liability, but they are entitled to apply under the clause to have the proceedings stayed⁴.

1 As to the scope of an arbitration clause see PARA 186 ante.

2 *Roper v Lendon* (1859) 1 E & E 825; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237 at 240 per Mathew J.

3 *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224 at 234 per Palles CB.

4 Arbitration Act 1996 s 9(1); see generally ARBITRATION vol 2 (2008) PARA 1222.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vi) Settlement of Disputed Claims/188. Arbitration as condition precedent.

188. Arbitration as condition precedent.

Arbitration clauses generally provide that an arbitrator's award is a condition precedent to proceedings on the policy, and that no proceedings are to be brought except for the amount of the award¹. The cause of action is then not complete until an arbitration has taken place in accordance with the clause and an award has been made by an arbitrator². The insurers' only obligation is to pay the amount awarded³ and unless the award is in his favour the insured can bring no proceedings at all⁴. Here, as in all other cases, if the insurers apply for a stay⁵, the court has no discretion and must grant it⁶, unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed⁷. If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings⁸.

1 Such a clause was considered by the House of Lords in the leading case of *Scott v Avery* (1856) 5 HL Cas 811, and is commonly known as a *Scott v Avery* clause: see PARA 98 text and note 5 ante.

2 *Scott v Avery* (1856) 5 HL Cas 811; *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782; *Elliott v Royal Exchange Assurance Co* (1867) LR 2 Exch 237; *Viney v Bignold* (1887) 20 QBD 172; *Scott v Mercantile Accident and Guarantee Insurance Co Ltd* (1892) 66 LT 811, CA; *Caledonian Insurance Co v Gilmour* [1893] AC 85, HL; *Spurrier v La Cloche* [1902] AC 446, PC; *Hodson v Railway Passengers' Assurance Co* [1904] 2 KB 833, CA; *King v Phoenix Assurance Co* [1910] 2 KB 666, CA; *Woodall v Pearl Assurance Co* [1919] 1 KB 593, CA; *Wales v Iron Trades Employers' Association Ltd* (1928) 21 BWCC 316, CA. This is the position even where the claim is made by a third party under the Third Parties (Rights against Insurers) Act 1930 s 1(1) (*Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515, CA; *Stevens & Sons v Timber and General Mutual Accident Insurance Association* (1933) 148 LT 515, CA) except, perhaps, as regards cases falling within the Road Traffic Act 1988 ss 148(5), 151 (as amended), 152 (as amended) (see PARAS 742 et seq, 746 et seq post).

3 *Scott v Mercantile Accident and Guarantee Insurance Co Ltd* (1892) 66 LT 811, CA; *Caledonian Insurance Co v Gilmour* [1893] AC 85, HL.

4 *Gaw v British Law Fire Insurance Co* [1908] 1 IR 245, CA. A party to arbitral proceedings may challenge any award on the grounds of the jurisdiction of the arbitrator or any serious irregularity affecting the proceedings or the award: Arbitration Act 1996 ss 67, 68; see ARBITRATION vol 2 (2008) PARAS 1276-1277.

5 They have no obligation to apply: *Viney v Bignold* (1887) 20 QBD 172.

6 *Kenworthy v Queen Insurance Co* (1892) 8 TLR 211; *Hodson v Railway Passengers' Assurance Co* [1904] 2 KB 833, CA. It is in fact to the insured's benefit that a stay should be granted; strictly, if it appears that no cause of action existed when the claim form was served, the proceedings ought to be struck out. However, this should be viewed in the light of the court's overriding objective: see CIVIL PROCEDURE.

7 Arbitration Act 1996 s 9(4).

8 *Ibid* s 9(5).

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188 Arbitration as condition precedent

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vi) Settlement of Disputed Claims/189. Queen's Counsel clause.

189. Queen's Counsel clause.

In the case of a policy indemnifying the insured against claims by third parties in respect of his professional negligence, it is sometimes provided that the insurers will pay any such claim which may arise without requiring the insured to dispute it, unless a Queen's Counsel advises that the claim can be successfully contested¹.

¹ See *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825-828, [1957] 1 WLR 45 at 49-54. For an analysis of the nature and effect of a Queen's Counsel clause see PARAS 695-696 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vii) Payment of Claims/190. Mode of payment of claims.

(vii) Payment of Claims

190. Mode of payment of claims.

Claims must generally¹ be paid in cash². If a negotiable instrument taken in payment is dishonoured, in general the insured may sue the insurers either upon the instrument or upon the original consideration³. Where an assessor or other agent negotiates a settlement with the insurers on behalf of the insured, it is improper for the insurers to make any payment to the assessor by way of fees, costs or commission without informing the insured⁴. Any such payment made without the insured's knowledge is a bribe entitling the insured to have the settlement set aside⁵. The insurers cannot rely on the assessor's word that his principal is aware of the payment⁶.

1 For the circumstances in which insurers may discharge their obligation by reinstating property see PARAS 632-639 post.

2 See CONTRACT vol 9(1) (Reissue) PARAS 943, 975. As to the position where the policy provides for payment in foreign currency see PARA 555 post. For the circumstances in which insurance money is a trade receipt for income tax purposes see INCOME TAXATION.

3 As to payment by negotiable instrument see CONTRACT vol 9(1) (Reissue) PARAS 951-955.

4 *Taylor v Walker* [1958] 1 Lloyd's Rep 490.

5 *Taylor v Walker* [1958] 1 Lloyd's Rep 490 at 509-513.

6 *Taylor v Walker* [1958] 1 Lloyd's Rep 490 at 513.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vii) Payment of Claims/191. Payment must be to proper person.

191. Payment must be to proper person.

Payment of a claim must be made to the person entitled, that is to say to the insured¹, his personal representative², assignee³ or trustee in bankruptcy⁴, as the case may be. If a third party debt order is made against the insurers, payment must be made to the judgment creditor⁵.

1 In the case of a joint policy, the receipt of any of the policyholders has been said to be sufficient: *Penniall v Harborne* (1848) 11 QB 368 at 376 per Lord Denman CJ. However, this is not the case where there is a composite policy, ie one covering a number of persons with differing interests in the subject matter insured: *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 KB 388, CA; *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24, [1996] CLC 1728, CA.

2 If a deceased insured was a trustee, his personal representative must account to the beneficiary for the money received: *Mildmay v Folgham* (1797) 3 Ves 471. Under some forms of personal accident insurance the insurers are empowered to exercise their discretion as to the person to whom payment is to be made: *Law v George Newnes Ltd* (1894) 21 R 1027, Ct of Sess; *Hunter v Hunter* (1904) 7 F 136, Ct of Sess; see further PARA 588 post. As to the persons entitled to payment in the case of life insurance see generally paras 556-561 post. As to powers of nomination conferred on members of registered friendly societies and powers to make payments on the death of a member of such a society see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2230. As to the effect of a provision in the rules of an unregistered friendly society for payment of death benefit to relatives of a member see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2102. As to discharge clauses permitting payment to persons other than personal representatives in the case of industrial assurance see INDUSTRIAL ASSURANCE. As to the persons entitled to give a good discharge for the policy money in the case of policies effected in favour of the insured's wife, husband or children under the Married Women's Property Act 1882 s 11 (as amended) see PARA 558 post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 274, 276.

3 *Ottley v Gray* (1847) 16 LJCh 512; *Desborough v Harris* (1855) 5 De GM & G 439; cf *Stokell v Heywood* [1897] 1 Ch 459.

4 *Logan v Hall* (1847) 4 CB 598 at 613 per Maule J; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA. As to the effect of the Third Parties (Rights against Insurers) Act 1930 see PARA 681 post.

5 *Randall v Lithgow* (1884) 12 QBD 525, DC (where there was in fact no ascertained and attachable debt due from the insurers to the insured at the date of the garnishee order, but the insurers allowed the order to be made against them by default); cf *Israelson v Dawson* [1933] 1 KB 301, CA (liability of insurers under motor insurance policy to indemnify insured against claims by third parties held not to be a debt attachable by a third party who had recovered judgment against the insured). As to the duty of insurers to satisfy judgments obtained by third parties see PARA 748 post. As to third party debt orders generally see CIVIL PROCEDURE vol 12 (2009) PARA 1411 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vii) Payment of Claims/192. Payment in the case of conflicting claims.

192. Payment in the case of conflicting claims.

The insurers are entitled on payment of a claim¹ to receive a legal discharge from their liability under the policy². In the case of life policies, where the right to the policy money is in doubt and conflicting claims are made, the insurers are entitled to discharge themselves from further liability by paying the money into court³. In other cases the insurers have no direct right to discharge their liability by making a payment into court⁴. Their only remedy is to interplead⁵.

If they obtain an interpleader order, it will normally be a term of the order that the policy money is paid into court with a provision that on payment into court the insurers are to have a complete discharge⁶.

1 As to the mode of payment of claims see PARA 190 ante; as to payment being made to the person entitled see PARA 191 ante.

2 *Re Haycock's Policy* (1876) 1 ChD 611.

3 Life Assurance Companies (Payment into Court) Act 1896 s 3 (as amended): see PARAS 561-562 post.

4 Insurers are debtors, not trustees, and therefore they cannot pay into court under the Trustee Act 1925 s 63: *Matthew v Northern Assurance Co* (1878) 9 ChD 80; and see TRUSTS vol 48 (2007 Reissue) PARAS 622, 917.

5 *Paris v Gilham* (1813) Coop G 56; *Prudential Assurance Co v Thomas* (1867) 3 Ch App 74; cf *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA.

6 *English and Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700, CA. As to interpleader generally see CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vii) Payment of Claims/193. Interest.

193. Interest.

The insured is not entitled to interest as a matter of course¹. However, in proceedings for the recovery of the policy money the court may, if it thinks fit, order that there be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or part of the debt for the whole or part of the period between the date when the cause of action arose and the date of the judgment². The court must exercise this power in certain circumstances in the case of damages in respect of personal injuries³. Interest is awarded to compensate a party for being kept out of the money from the date when it is established it was due to him⁴; it is not based on the fault or the wrongful withholding of payment by the insurer; the need to investigate a claim will not generally postpone the running of interest⁵. If, in the case of a life insurance policy, the insurers pay the money into court, interest will be awarded only up to the date of payment into court⁶. The rate of interest will generally be at 1 per cent above bank rate. Interest apart, the insured is not entitled to any other form of compensation for the insurers' failure to pay the claim from the outset, even where the assured has suffered loss of profits by reason of the insurers' delay⁷.

¹ *Higgins v Sargent* (1823) 2 B & C 348; *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA.

² Supreme Court Act 1981 s 35A(1) (s 35A added by the Administration of Justice Act 1982 s 15, Sch 1 Pt I); see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307. As to the power of an arbitrator to award interest see the Arbitration Act 1996 s 49; and ARBITRATION vol 2 (2008) PARA 1260. The statutory power to award interest does not apply in winding up proceedings so as to enable interest to be awarded to unsecured creditors of a solvent company: *Re Fine Industrial Commodities Ltd* [1956] Ch 256, [1955] 3 All ER 707. As to the proof for interest in the winding up of a company see further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 795. As to provisions by which a judgment debt carries interest see the Judgments Act 1838 s 17 (amended by the Civil Procedure Acts Repeal Act 1879 s 2, Schedule Pt I; the Statute Law Revision Act 1888; the Judgment Debts (Rate of Interest) Order 1993, SI 1993/564; the Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940; and the Civil Procedure Rules 1998, SI 1998/3132); and see CIVIL PROCEDURE vol 12 (2009) PARA 1149.

³ Law Reform (Miscellaneous Provisions) Act 1934 s 3(1A) (added by the Administration of Justice Act 1969 s 22); Supreme Court Act 1981 s 35A (as added: see note 2 supra); County Courts Act 1984 s 69 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 46; and the Civil Procedure Act 1997 s 10, Sch 2 para 2(2)).

⁴ In cases where the delay and degree of fault were so substantial that the predominant cause of the claimant being out of his money could be seen as his own failure to prosecute the claim, rather the defendant's maintenance of a defence, the policy should be that the claimant should not be compensated for the loss of use of the money: *Quorum A/S v Schramm (No.2)* [2002] 2 All ER (Comm) 179.

⁵ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925, [1979] 1 WLR 783; *Kuwait Airways Corp v Kuwait Insurance Co SAK* [2000] Lloyd's Rep IR 678; *Hellenic Industrial Development Bank SA v Atkin, The Julia* [2002] EWHC 1405 (Comm). However, in unusual or complex insurance claims, the court would usually exercise its discretion on the basis that it was proper to allow insurers some time to consider the claim: *Quorum A/S v Schramm (No 2)* [2002] 2 All ER (Comm) 179.

⁶ *Re Rosier's Trusts* (1877) 37 LT 426; *Re Waterhouse's Policy* [1937] Ch 415, [1937] 2 All ER 91 (interest given at 4%); cf *French v Royal Exchange Assurance Co* (1857) 6 L Ch R 523 (conflicting claims; agreement that insurers should not bring money into court; no interest payable).

⁷ *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111, CA; *Pride Valley Foods Ltd v Independent Insurance Co Ltd and Lombard General Insurance Co Ltd* [1999] Lloyd's Rep IR 120, CA.

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193 Interest

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(9) CLAIMS UNDER POLICIES/(vii) Payment of Claims/194. Ex gratia payments.

194. Ex gratia payments.

To entitle the insured to receive payment under a policy, the insurers must be legally liable to make it; but it is the practice of insurers, in proper cases, to make ex gratia payments in respect of losses which are not strictly covered by the policy¹. Ex gratia payments are made in the ordinary course of business and are therefore not ultra vires the insurers². The insurers are not precluded from disputing their legal liability under a policy by the fact that they have previously made ex gratia payments under similar policies in similar circumstances³.

1 It has been held that a trustee in bankruptcy cannot claim an ex gratia payment made to the insured after his bankruptcy (*Wills v Wells* (1818) 8 Taunt 264), but the correctness of this decision may be doubted at any rate as a general proposition; an ordinary trustee receiving an ex gratia payment must account for it to the beneficiary (*Rayner v Preston* (1881) 18 ChD 1 at 15, CA, per James LJ).

2 *Taunton v Royal Insurance Co* (1864) 2 Hem & M 135. Payment under an ultra vires policy cannot, however, be justified as an ex gratia payment: *Evanson v Crooks* (1911) 28 TLR 123 at 124 per Hamilton J.

3 *London and Manchester Plate Glass Co Ltd v Heath* [1913] 3 KB 411, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/195. Inherent right in all contracts of indemnity.

(10) SUBROGATION

(i) Subrogation generally

195. Inherent right in all contracts of indemnity.

The doctrine of subrogation¹ applies to all contracts of non-marine insurance which are contracts of indemnity, such as fire insurance², motor insurance³ and contingency insurance covering non-payment of money⁴. It applies whether the loss is total or partial, and is a corollary of the principle of indemnity. By requiring any means of diminishing or extinguishing a loss to be taken into account, it prevents the insured from recovering more than a full indemnity⁵. The doctrine of subrogation does not apply to contracts of life insurance⁶ and personal accident insurance⁷.

1 As to subrogation generally see PARAS 490-494 post. As to the statutory subrogation of third parties to the rights of the insured against his insurers see PARAS 677-684 post.

2 *Castellain v Preston* (1883) 11 QBD 380, CA. See PARAS 591-643 post.

3 *Horse, Carriage and General Insurance Co Ltd v Petch* (1916) 33 TLR 131; *Page v Scottish Insurance Corp* (1929) 140 LT 571, CA. See PARAS 706-765 post.

4 *Meacock v Bryant & Co* [1942] 2 All ER 661. See PARAS 780-804 post.

5 *Castellain v Preston* (1883) 11 QBD 380 at 387-388, CA, per Brett LJ.

6 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365; *Law v London Indisputable Life Policy Co* (1855) 1 K & J 223. See PARAS 525-566 post.

7 There is no direct authority as regards personal accident insurance; the absence of any right of subrogation seems, however, to follow from the principle that personal accident insurance is not a contract of indemnity: *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45 at 53 per Alderson B; *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1 at 2 per Bramwell B.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/196. Nature of the right.

196. Nature of the right.

In the strict sense of the term, subrogation expresses the right of the insurers to be placed in the position of the insured so as to be entitled to the advantage of all the rights and remedies which the insured possesses against third parties in respect of the subject matter¹. The precise nature of the third party's liability to the insured is immaterial; subrogation applies even to a statutory liability². If the third parties are insured, the ultimate liability for the loss falls on their insurers³. The right does not arise until the insurers have admitted their liability to the insured⁴, and have paid him all amounts due in respect of the loss⁵.

1 *Castellain v Preston* (1883) 11 QBD 380 at 388, CA, per Brett LJ, and at 404 per Bowen LJ; *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4 at [11], [2002] 1 All ER (Comm) 321 at [11], per Lord Bingham of Cornhill. See also *Darrell v Tibbitts* (1880) 5 QBD 560 at 563, CA, per Brett LJ; *Meacock v Bryant & Co* [1942] 2 All ER 661 (insurance against non-receipt of money within a given time; claim paid under policy; money received after time expired; right of insurers to be subrogated); *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703 (right of Board of Trade to subrogation in respect of payment under policy insuring exporters against loss from inability of foreign buyers to transfer currency; see further PARA 792 post).

2 *Ellerbe Collieries Ltd v Cornhill Insurance Co Ltd* [1932] 1 KB 401 at 411, CA, per Scrutton LJ. Where a person who has sustained loss by riot has received, by way of insurance or otherwise, any sum to recoup him, in whole or in part, for the loss, the amount of the sum so received is deducted from the statutory compensation otherwise payable to him, and the person who has paid the sum is entitled to statutory compensation to the extent of the sum so paid; any policy of insurance given by the person who paid the sum continues in force as if he had made no payment: Riot (Damages) Act 1886 s 2(2). Where the recoupment was otherwise than by payment of a sum, the foregoing provisions apply as if the value of the recoupment were a sum paid: s 2(2); and see *Rance v Hastings Corp* (1913) 136 LT Jo 117 (compensation payable to persons who had indemnified hotel keeper in whose hotel they had taken refuge from mob; a county court decision). As to statutory compensation in case of riot see POLICE vol 36(1) (2007 Reissue) PARAS 173-177.

3 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA.

4 *Midland Insurance Co v Smith* (1881) 6 QBD 561 at 564 per Watkin Williams J; *Page v Scottish Insurance Corp Ltd* (1929) 140 LT 571, CA.

5 *Castellain v Preston* (1883) 11 QBD 380 at 389, CA, per Brett LJ; *Page v Scottish Insurance Corp Ltd* (1929) 140 LT 571 at 575, CA, per Scrutton LJ; see also *Mason v Sainsbury* (1782) 3 Doug KB 61; *Quebec Fire Insurance Co v St Louis* (1851) 7 Moo PCC 286 at 316; *Finlay v Mexican Investment Corp* [1897] 1 QB 517; *Scottish Union and National Insurance Co v Davis* [1970] 1 Lloyd's Rep 1, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/197. Rights in tort.

197. Rights in tort.

The most obvious case of subrogation arises in tort, where the loss is attributable to some wrongful act or default of a third party. There is subrogation under a fire policy where the property insured is burned by the negligence¹ or wilful act² of a third party; under a motor policy there is subrogation if the insured vehicle is damaged by the third party's negligence³, or if a third party liability has been incurred owing to negligence in the driving of the vehicle by an employee of the insured⁴. Similarly, the insurers under a fidelity policy may claim reimbursement from a dishonest employee⁵; and the insurers under a burglary policy may claim from the burglar⁶.

1 *Groom v Great Western Rly Co* (1892) 8 TLR 253; *Ross Southward Tire Ltd v Pyrotech Products Ltd* (1975) 57 DLR (3d) 248, Can SC (where there was no right of subrogation because the tenant, who had been negligent, was responsible for the payment of the premium and the risk of loss passed to the landlord); cf *King v Victoria Insurance Co Ltd* [1896] AC 250 at 256, PC.

2 See *Midland Insurance Co v Smith* (1881) 6 QBD 561, where the wife of the insured set fire to the insured property.

3 *Horse, Carriage and General Insurance Co Ltd v Petch* (1916) 33 TLR 131. Motor insurers used generally to have a 'knock-for-knock' agreement under which there is no subrogation, the damage to each vehicle being borne by its owner's insurers: see eg *Morley v Moore* [1936] 2 KB 359, [1936] 2 All ER 79, CA; *Bourne v Stanbridge* [1965] 1 All ER 241, [1965] 1 WLR 189, CA; *Hobbs v Marlowe* [1978] AC 16, [1977] 2 All ER 241, HL. As to knock-for-knock agreements see PARAS 203 text and note 4, 726 post.

4 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL.

5 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 916, HL, per Lord Blackburn.

6 *Symons v Mulkern* (1882) 46 LT 763; cf *Employers' Liability Assurance Corp'n v Skipper and East* (1887) 4 TLR 55.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/198. Rights in contract.

198. Rights in contract.

The doctrine of subrogation is not confined to cases of tort; the liability of the third party may arise under a contract. This is clearly the case where the contract imposes on the third party responsibility for the safety of the property. The insurers of a bailor or of a landlord may enforce their insured's rights and remedies against the bailee¹ or tenant²; if a debt is guaranteed, the insurers of the debt may enforce the guarantee³. However, it is not necessary that the contract should directly impose responsibility for the safety of the property; it is sufficient if the contract relates to the property insured, and will, if duly performed, place the insured in the same position as if the loss had not happened⁴. A possible exception to the rule that the insurers are entitled to have the contract performed exists in the case of a contract for the sale of real property, where the property has been destroyed between the date of the signing of the contract and the date of completion of the sale. In such a case, if the vendor's insurers indemnify him in respect of the destruction of the property and the circumstances are not such that the vendor holds the insurance money for the purchaser's benefit on completion⁵, the insurers are entitled, if the sale is completed, to recover from the vendor out of the purchase price a sum equal to the insurance money which they have paid⁶; but if the purchaser fails to complete, it is doubtful whether the insurers can enforce specific performance of the contract⁷. The insurers of a mortgagee are entitled to enforce his rights under the mortgage against the mortgagor⁸, and the insurers of a landlord may claim the benefit of a tenant's covenant to insure⁹. The insurers' right of subrogation takes priority over that of any other person who is required to indemnify the insured under a contract, so that if both the insurers and another person are required to indemnify the insured for a particular loss, the insurers have subrogation rights against that other person rather than a mere right of contribution¹⁰.

1 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA.

2 *Darrell v Tibbitts* (1880) 5 QBD 560, CA; cf *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226, CA.

3 *Parr's Bank v Albert Mines Syndicate* (1900) 5 Com Cas 116.

4 *Castellain v Preston* (1883) 11 QBD 380 at 390, CA, per Brett LJ.

5 For statutory provisions by which, provided that certain conditions are fulfilled, the vendor holds the insurance money for the purchaser's benefit on completion and is under a duty to pay it over to him, see PARA 625 post. It seems that, in a case where these provisions apply, the insurers will have no right to have repayment of the insurance money out of the purchase price, since the vendor has not had the benefit of the money.

6 *Castellain v Preston* (1883) 11 QBD 380, CA; see also *Phoenix Assurance Co v Spooner* [1905] 2 KB 753 (compulsory purchase; insured agreed with acquiring authority to accept compensation reduced by amount of insurance money; insurers entitled to recover full amount of insurance money from insured).

7 *Castellain v Preston* (1883) 11 QBD 380 at 390, CA, per Brett LJ, and at 405 per Bowen LJ, who suggested that the insurers, even if unable to enforce specific performance, might be able to enforce an unpaid vendor's lien.

8 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583, CA, per Mellish LJ. There is no subrogation if the mortgagee intended to insure the mortgagor's interest as well as his own: *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190; also reported in 14 R 1094, Ct of Sess.

9 *Enlayde Ltd v Roberts* [1917] 1 Ch 109.

10 *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4, [2002] 1 All ER (Comm) 321, [2002] Lloyd's Rep 553.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/199. Right to be exercised in name of insured.

199. Right to be exercised in name of insured.

In the absence of a formal assignment of the right of action¹, the insurers cannot sue the third party in their own names²; they must bring the proceedings in the name of the insured³. On receiving a proper indemnity against costs⁴, the insured is required to permit his name to be used in such proceedings⁵.

1 For examples of such assignments see *Employers' Liability Assurance Corp'n v Skipper and East* (1887) 4 TLR 55; *King v Victoria Insurance Co Ltd* [1896] AC 250, PC. A right of action arising under a contract or in tort is a legal chose in action: see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

2 *London Assurance Co v Sainsbury* (1783) 3 Doug KB 245. For the principle that the assignee of a legal chose in action can sue in his own name only if there has been a legal assignment see CHOSSES IN ACTION vol 13 (2009) PARA 72 et seq; and CONTRACT vol 9(1) (Reissue) PARAS 757-758. The insurers cannot prove in the bankruptcy of the third party in their own names: *Re Blackburne, ex p Strouts* (1892) 9 Morr 249.

3 *Mason v Sainsbury* (1782) 3 Doug KB 61; *Clark v Blything Inhabitants* (1823) 2 B & C 254. Sometimes there is an express term in the policy giving them this right: see eg *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555, [1957] 1 All ER 125, HL (motor insurance); *Kitchen Design and Advice Ltd v Lea Valley Water Co* [1989] 2 Lloyd's Rep 221 (damage and loss of profits insurance). If the insured will not co-operate, since the Judicature Act 1873 the insurer may bring an action in his own name joining the insured as co-defendant.

4 See *King v Victoria Insurance Co Ltd* [1896] AC 250, PC.

5 *Dane v Mortgage Insurance Corp'n* [1894] 1 QB 54 at 61, CA, per Lord Esher MR. The doctrine of subrogation should not be used to compel employers to lend their name to an action making their employee personally liable for his negligence where the risk is covered by insurance: *Morris v Ford Motor Co Ltd* [1973] QB 792, [1973] 2 All ER 1084, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/200. Defences in subrogation proceedings.

200. Defences in subrogation proceedings.

In subrogation proceedings the third party may raise any defence which would have been available if the insured had himself brought the proceedings¹, such as a release or compromise². It is not a defence that the proceedings are subrogation proceedings³; the third party cannot object that the insured has suffered no loss because he has been indemnified by the insurers⁴, or that the payment was an ex gratia payment⁵. Insurers do not have any subrogation rights against a co-insured by reason of an implied term in the contract of insurance⁶.

¹ *London Assurance Co v Sainsbury* (1783) 3 Doug KB 245; *Finlay v Mexican Investment Corp*n [1897] 1 QB 517.

² *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226, CA; *Phoenix Assurance Co v Spooner* [1905] 2 KB 753.

³ The third party cannot, therefore, insist on the insurers being made parties to the action: *Symons v Mulkern* (1882) 46 LT 763.

⁴ *Mason v Sainsbury* (1782) 3 Doug KB 61; *London Assurance Co v Sainsbury* (1783) 3 Doug KB 245; *Darrell v Tibbitts* (1880) 5 QBD 560, CA.

⁵ *Mason v Sainsbury* (1782) 3 Doug KB 61; *King v Victoria Insurance Co Ltd* [1896] AC 250, PC. As to ex gratia payments see PARA 194 ante.

⁶ *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd (Carillion Construction Ltd, Pt 20 defendants)* [2002] UKHL 17, [2002] 1 All ER (Comm) 918, [2002] 1 WLR 1419.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/201. Damages recoverable.

201. Damages recoverable.

The damages recoverable in subrogation proceedings are not limited to the amount paid by the insurers under the policy. The insurers may keep what is recovered in the proceedings up to the amount they have paid; any excess belongs to the insured, unless the policy modifies the rights of the parties or the insured has assigned his rights to the insurers¹. The insured may retain interest accruing prior to the date of settlement by the insurers but thereafter such interest must go to the insurers².

1 *Lonrho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, [1996] 4 All ER 673; and see the cases cited in PARA 491 note 1 post; cf the distinction between subrogation and rights arising on abandonment in PARA 492 post.

2 *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(i) Subrogation generally/202. Insured's duties.

202. Insured's duties.

It is the duty of the insured not to do any act which may prejudice the right of subrogation¹. He must not, without the insurers' consent, settle the claim against the third party², or take proceedings himself to enforce it³. However, where the amount of the loss exceeds the amount paid under the policy, there is a case of partial subrogation only, and the insured is not necessarily deprived of his right to take proceedings⁴. Any proceedings which he may institute must be conducted for the benefit of the insurers as well as of himself⁵. If, after the insurers have become subrogated as regards a specific sum of money or other property, the money or property comes into the hands of the insured, he holds as trustee for the insurers; in the event of the insured having been adjudicated bankrupt or having gone into liquidation, the insurers, not the creditors generally, are entitled to the money or property⁶.

1 *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226 at 229, CA, per Lord Esher MR.

2 *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226, CA; *Phoenix Assurance Co v Spooner* [1905] 2 KB 753; *Horse, Carriage and General Insurance Co Ltd v Petch* (1916) 33 TLR 131.

3 *Law Fire Assurance Co v Oakley* (1888) 4 TLR 309 per Mathew J (during the argument of counsel).

4 See *Page v Scottish Insurance Corp'n* (1929) 140 LT 571 at 576, CA, per Scrutton LJ.

5 *Commercial Union Assurance Co v Lister* (1874) 9 Ch App 483. The same principle applies where, in the case of partial subrogation, the proceedings are conducted by the insurers: *Quebec Fire Insurance Co v St Louis* (1851) 7 Moo PCC 286 at 319. Where an insured had reasonably incurred legal costs or other expenditure in reasonable attempts to recover the insured loss, that expenditure could be deducted from any sum that the insurer might recoup from the insured, even though it had been incurred in connection with a failed claim or litigation. Such expenditure was not confined to legal costs and expenses incurred as part of an action, but extended to pre-trial investigations and other costs which had been reasonably directed to attempts to reduce the insured's loss: *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481, [2000] Lloyd's Rep IR 404.

6 *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; see also *Meacock v Bryant & Co* [1942] 2 All ER 661.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(ii) Indemnification from Another Source/203. Insured's rights.

(ii) Indemnification from Another Source

203. Insured's rights.

The fact that the insured may be entitled to be compensated for his loss by a third party does not in itself absolve the insurers from their obligations under the policy. Unless the policy so provides¹, the insured is not bound to exhaust his rights and remedies against third parties before having recourse to the insurers²; he is entitled in the first instance to claim a full indemnity under the policy, leaving the insurers to exercise their right of subrogation³. He is not obliged to refrain from suing a third party for damage caused by the third party's negligence merely because he has been paid in full by his own insurers, pursuant to an agreement between them and the insurers of the third party by which each insurance company pays for damage to its own insured⁴. If he sues and is successful, he must account to his insurers for any sum recovered in respect of a matter for which they have paid him⁵.

1 See *London Guarantie Co v Fearnley* (1880) 5 App Cas 911, HL.

2 *Fifth Liverpool Starr-Bowkett Building Society v Travellers Accident Insurance Co Ltd* (1893) 9 TLR 221; cf *Collingridge v Royal Exchange Assurance Corp* (1877) 3 QBD 173; *Darrell v Tibbitts* (1880) 5 QBD 560, CA.

3 *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226, CA. See also PARA 797 post.

4 *Morley v Moore* [1936] 2 KB 359, [1936] 2 All ER 79, CA. Such an agreement between insurers is known as a 'knock-for-knock' agreement; see further PARA 726 post.

5 *Morley v Moore* [1936] 2 KB 359 at 366, [1936] 2 All ER 79 at 83, CA; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481, [2000] Lloyd's Rep IR 404.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(ii) Indemnification from Another Source/204. Compensation before payment under policy.

204. Compensation before payment under policy.

If, before payment is made under an insurance policy, the third party makes a payment to the insured to compensate him for the loss¹, the loss which the insured has suffered is diminished, and he can no longer claim payment in full under the policy. The amount received from the third party must be taken into account, and the liability of the insurers, according to the amount so paid, will be diminished or entirely extinguished².

1 The payment is usually made in discharge of a legal liability, but the principle applies equally to voluntary payments, if made for the purpose of alleviating the loss (*Godsall v Boldero* (1807) 9 East 72, which is still applicable to contracts of indemnity); but there must be nothing in the circumstances of the payment showing an intention to exclude the insurers from benefit (*Castellain v Preston* (1883) 11 QBD 380 at 404, CA, per Bowen LJ).

2 *Darrell v Tibbitts* (1880) 5 QBD 560 at 562, CA, per Brett LJ; *Castellain v Preston* (1883) 11 QBD 380 at 393, CA, per Cotton LJ; see also *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333 at 389, HL, per Lord Blackburn; *Willumsen and Larwill Construction Co Ltd v Royal Insurance Co Ltd and Western Assurance Co* [1975] 5 WWR 703, Alta App Div.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(10) SUBROGATION/(ii) Indemnification from Another Source/205. Compensation after payment under policy.

205. Compensation after payment under policy.

The principle that payments made by third parties in compensation for a loss must be taken into account when paying under an insurance policy applies equally to payments received from third parties after payment of the loss in full under the policy¹. As the insured has already been indemnified by the insurers, if he is allowed to retain the money paid by the third party, he will be indemnified twice over². Therefore, he must account to the insurers for the money received from the third parties to the extent of the amount which they have paid him³.

The damages recovered by the insured from a wrongdoer are subject to an equitable proprietary lien or charge in favour of the insurers⁴.

1 See PARA 204 note 1 ante.

2 *Darrell v Tibbitts* (1880) 5 QBD 560, CA.

3 *Castellain v Preston* (1883) 11 QBD 380, CA; *Law Fire Assurance Co v Oakley* (1888) 4 TLR 309; *King v Victoria Insurance Co Ltd* [1896] AC 250, PC; *Stearns v Village Main Reef Gold Mining Co* (1905) 10 Com Cas 89, CA; *Horse, Carriage and General Insurance Co Ltd v Petch* (1916) 33 TLR 131; *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL (stop-loss insurance).

4 *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL; see also *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481, [2000] Lloyd's Rep IR 404.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(i) Over-insurance by Double Insurance/206. Meaning of 'double insurance'.

(11) CONTRIBUTION AND AVERAGE

(i) Over-insurance by Double Insurance

206. Meaning of 'double insurance'.

'Double insurance' in the strict sense exists where two or more policies are effected by or on behalf of the same insured in respect of the same interest and the total of the sums insured exceeds what is required to secure to the insured a full indemnity¹. Generally, the existence of double insurance is important only in so far as it may affect the amount recoverable under a particular policy in the case of indemnity insurance²; it does not necessarily invalidate any of the policies concerned. In the case of an insurance which is not a contract of indemnity, eg an insurance on the life of the insured, the existence of other such contracts does not, in the absence of specific provision in the contract in question³, affect either the validity of the insurance or the amount recoverable⁴.

1 Cf the Marine Insurance Act 1906 s 32(1); and PARAS 495-497 post.

2 See PARA 210 post.

3 See PARAS 207-209 post.

4 The position differs in respect of insurances on the life of a third person: see PARA 210 text and note 1 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(i) Over-insurance by Double Insurance/207. Condition as to 'other insurances'.

207. Condition as to 'other insurances'.

A proposal for non-marine insurance often contains a question requiring existing insurances to be disclosed; if the truth of the answers is made the basis of the contract¹, a failure to disclose all the existing insurances will avoid the policy². Occasionally the policy contains an express condition avoiding the policy unless all existing insurances are notified to the insurers and particulars are indorsed on the policy³. Alternatively, there may be a condition declaring the insurance not to be operative in the case of a loss covered by another insurance⁴. If the other insurance itself contains a similar condition, the two conditions are mutually destructive and each set of insurers is liable, subject to any rateable contribution clauses which there may be⁵. There must be another insurance of the same interest if such a condition is to be operative⁶.

1 See PARA 62 ante.

2 *Wainwright v Bland* (1836) 1 M & W 32; *London Assurance v Mansel* (1879) 11 ChD 363.

3 *Citizens' Insurance Co of Canada v Parsons* (1881) 7 App Cas 96, PC; *National Protector Fire Insurance Co Ltd v Nivert* [1913] AC 507, PC; *Steadfast Insurance Co Ltd v F and B Trading Co Pty Ltd* (1971) 125 CLR 578, Aust HC.

4 Such clauses are common in the competitive market of motor vehicle insurance and are described as 'non-contribution' or 'excess of loss' clauses. Cf 'rateable contribution' clauses, which aim at providing that only a pro rata payment will be made if another insurance is operative. A policy in this form will achieve its result if the other party has a rateable contribution clause or no clause dealing with contribution rate; if the other party has a non-contribution clause, its underwriters cannot be made to share because there is, ex hypothesi, another insurance on risk: see the cases cited in note 5 infra.

5 *Gale v Motor Union Insurance Co Ltd* [1928] 1 KB 359; *Weddell v Road Transport and General Insurance Co Ltd* [1932] 2 KB 563; *Monksfield v Vehicle and General Insurance Co Ltd* [1971] 1 Lloyd's Rep 139.

6 *Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601.

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208. Disclosure of subsequent insurances.

The duty to disclose existing insurances in answer to a question extends to insurances which come into existence after the date of the proposal, but before the issue of the policy¹; but it has no application to insurances effected subsequently. Sometimes there is an express condition of the policy prohibiting any subsequent insurance without the insurers' consent². More usually the condition merely requires any such insurances to be notified and indorsed on the policy³.

¹ *Re Marshall and Scottish Employers' Liability and General Insurance Co Ltd* (1901) 85 LT 757. See generally para 43 ante.

² *Marcovitch v Liverpool Victoria Friendly Society* (1912) 28 TLR 188, CA (on the facts, insurers held to have consented).

³ *Sulphite Pulp Co v Faber* (1895) 1 Com Cas 146; *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC; *National Protector Fire Insurance Co v Nivert* [1913] AC 507, PC.

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209. Breach of condition against double insurance.

To constitute a breach of a condition against double insurance the second policy must cover the same interest¹ against the same risk², and must be a valid and effective contract of insurance³. Further, the breach must be real; a new policy substituted for an existing policy which has been duly notified is not a breach⁴.

1 As to the same interest see PARA 211 text to notes 3-10 post.

2 Hence there is no breach where two policies of different kinds (eg a fire policy and a marine policy) accidentally overlap, eg where property in a warehouse awaiting shipment is destroyed by fire (*Australian Agricultural Co v Saunders* (1875) LR 10 CP 668, Ex Ch); cf *Westminster Fire Office v Reliance Marine Insurance Co* (1903) 19 TLR 668, CA; see also *American Surety Co of New York v Wrightson* (1910) 16 Com Cas 37 at 51; *Gale v Motor Union Insurance Co Ltd* [1928] 1 KB 359.

3 *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC.

4 *National Protector Fire Insurance Co v Nivert* [1913] AC 507, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(ii) Contribution/210. Contribution in the case of over-insurance.

(ii) Contribution

210. Contribution in the case of over-insurance.

Subject to any policy conditions to the contrary, the insured may effect as many policies as he pleases; but where the contract is one of indemnity¹, however numerous the policies may be, he cannot recover more than the total amount of his loss². Most policies of non-marine insurance contain a contribution clause limiting the liability of the insurers to their rateable proportion of the loss³. In this case the insured cannot claim payment in full under any of the policies; each policy is liable for its rateable proportion only⁴. If there is no such contribution clause in the policy, the insured is entitled to claim payment in full under any of the policies, leaving the insurers under that policy to claim contribution from their co-insurers⁵. The policy may contain a 'non contribution' or 'excess of loss' clause excluding liability for any loss covered by other insurance⁶. Such a clause is designed to avoid contribution. Contribution is an equitable principle: insurers cannot seek contribution from each other under the Civil Liability (Contribution) Act 1978⁷.

1 The same principle applies to policies of life assurance when founded upon an insurable interest in the life of a third person: *Hebdon v West* (1863) 3 B & S 579.

2 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 581, CA; *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287 at 303, Ct of Sess; and see *Wolenberg v Royal Co-operative Collecting Society* (1915) 112 LT 1036, DC, followed in *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291. As to double insurance see PARA 206 ante.

3 See eg *Gale v Motor Union Insurance Co Ltd* [1928] 1 KB 359; *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804, [1977] 1 All ER 441, CA (where the independent liability and not the maximum liability basis was applied).

4 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA; *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287, Ct of Sess; *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190; *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* 2000 SLT 1123, [2000] Lloyd's Rep IR 249, Ct of Sess (affd on other grounds [2002] UKHL 4, [2002] 1 All ER (Comm) 321, [2002] Lloyd's Rep 553).

5 See generally para 495 et seq post.

6 *Irish National Insurance Co Ltd v Oman Insurance Co Ltd* [1983] 2 Lloyd's Rep 453; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, [1996] 3 All ER 46, HL; and see PARA 207 text and note 4.

7 *Bovis Construction Ltd v Commercial Union Assurance Co plc* [2001] 1 Lloyd's Rep 416, [2001] Lloyd's Rep IR 321. As to the Civil Liability (Contribution) Act 1978 see DAMAGES vol 12(1) (Reissue) PARA 837 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(ii) Contribution/211. Conditions giving rise to right of contribution.

211. Conditions giving rise to right of contribution.

The following conditions must be satisfied before a right of contribution can arise¹.

- 63 (1) Each policy must cover the event which in fact happens, namely, the loss of the same property by the same peril. The policies need not be restricted to the same property, and they may include other perils; but there is no contribution unless there is a common loss caused by a peril common to the policies².
- 64 (2) Each policy must cover the same interest in the same property, that is to say, each policy must be intended to protect the same insured against the same loss. The policies must cover a common interest; it is not sufficient that they cover the same property³. Where separate insurances are effected on the same property by different persons interested in it for the purpose of protecting their separate interests only, there is no contribution⁴. There is no contribution where separate policies are affected by bailor and bailee⁵, by mortgagor and mortgagee⁶, or by landlord and tenant⁷ for their individual protection. Where one of the policies is intended to enure for the benefit of both persons interested, as, for instance, where the bailee, mortgagor or tenant intends to cover the interest of his bailor, mortgagee or landlord as well as his own⁸, a case of contribution arises between such policy and any policy effected by the bailor, mortgagee or landlord for his separate protection, since both policies, in fact, cover a common interest, namely, the interest of the bailor, mortgagee or landlord⁹. It is for this reason that a tenant who, having an option to purchase, exercises it after payment for a loss has become due both under his own and under his landlord's policy, is entitled to the benefit of the payment to the landlord¹⁰.
- 65 (3) Each policy must be in force at the time of the loss. There is no contribution if one of the policies has already become void¹¹ or the risk under it has not yet attached¹²; the insurer from whom contribution is claimed can repudiate liability under his policy on the ground that the insured has broken a condition¹³.
- 66 (4) Each policy must be a legal contract of insurance. There is no contribution where one of the insurances, though expressed in the form of a policy, is not legally binding¹⁴.

1 See *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977 at 980, Ct of Sess.

2 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 581, CA, per James LJ; see also *American Surety Co of New York v Wrightson* (1910) 16 Com Cas 37.

3 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA; applied in *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287, Ct of Sess; and *Andrews v Patriotic Assurance Co (No 2)* (1886) 18 LR Ir 355. Cf para 209 note 2 ante.

4 In this case there is subrogation: see PARA 198 ante.

5 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA.

6 *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287, Ct of Sess.

7 *Andrews v Patriotic Assurance Co (No 2)* (1886) 18 LR Ir 355; *Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601.

8 As to such insurances see PARA 615 post.

9 *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190, more fully reported in 14 R 1094, Ct of Sess; *Halifax Building Society v Keighley* [1931] 2 KB 248.

10 *Reynard v Arnold* (1875) 10 Ch App 386, CA; and see EQUITY.

11 *Weddell v Road Transport and General Insurance Co Ltd* [1932] 2 KB 563; *Drake Insurance plc v Provident Insurance plc* [2003] EWHC 109 (Comm), [2003] All ER (D) 02 (Feb).

12 *Sickness and Accident Assurance Association v General Accident Assurance Corpn* (1892) 19 R 977, Ct of Sess.

13 *Monksfield v Vehicle and General Insurance Co Ltd* [1971] 1 Lloyd's Rep 139; *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130, [1993] 3 All ER 1, PC. Cf *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887, [1992] 1 All ER 283, CA.

14 *Woods v Co-operative Insurance Society* 1924 SC 692. As questions of contribution normally affect only the insurers concerned and since the insured in any event receives an indemnity in respect of the loss, they are usually settled privately, and very rarely come before the court.

UPDATE

211 Conditions giving rise to right of contribution

NOTE 11--*Drake Insurance*, cited, reversed: [2003] EWCA Civ 1834, [2004] QB 601 (insurer who made full payment and who made it clear that it disputed separate insurer's liability so that payment was made under reserve or protest not acting as volunteer and entitled to contribution).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(iii) Under-insurance and Average/212. Under-insurance not penalised.

(iii) Under-insurance and Average

212. Under-insurance not penalised.

Unlike policies of marine insurance¹, non-marine policies are not subject to average unless there is an express condition to that effect². The insured is not penalised in the case of under-insurance³; he bears no part of the loss until the policy is exhausted⁴, but is entitled to recover the full amount of the loss, whether total or partial, up to the sum insured⁵.

1 See PARA 420 post.

2 *Joyce v Kennard* (1871) LR 7 QB 78.

3 There may, however, be a condition requiring the property to be insured for its full value, in which case an honest estimate is sufficient: *King v Traveller's Insurance Association Ltd* (1931) 48 TLR 53.

4 *Sillem v Thornton* (1854) 3 E & B 868 at 888 per Lord Campbell CJ; see also *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co* (1904) 10 Com Cas 1 at 9 per Walton J.

5 *Fifth Liverpool Starr-Bowkett Building Society v Travellers Accident Insurance Co Ltd* (1893) 9 TLR 221; *Newman v Maxwell* (1899) 80 LT 681.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(iii) Under-insurance and Average/213. Average clauses.

213. Average clauses.

Policies insuring goods usually contain an average clause¹ providing that if at the time of the loss the sum insured is less than the value of the property, the insured is to be considered as his own insurer² for the difference and must bear a rateable proportion of the loss accordingly³.

1 It is usually called the 'first condition of average', in contradistinction to the 'second condition of average', which is not an average condition, but rather a contribution clause.

2 This phrase means that the insured bears the risk himself: *Grey v Ellison* (1856) 1 Giff 438 at 442 per Stuart V-C.

3 This clause is implied in a Lloyd's policy if it is stated to be 'subject to average': *Acme Wood Flooring Co Ltd v Marten* (1904) 90 LT 313. Similarly, where there is a contract between shipowner and consignee that goods arriving in ships belonging to the shipowner are to be warehoused by the shipowner and kept covered by insurance, an average clause is to be implied: *Carreras v Cunard Steamship Co* [1918] 1 KB 118.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/2. GENERAL PRINCIPLES OF NON-MARINE INSURANCE/(11) CONTRIBUTION AND AVERAGE/(iii) Under-insurance and Average/214. 'First loss' and 'excess' clauses.

214. 'First loss' and 'excess' clauses.

Instead of the ordinary average clause, an insurance policy may contain a condition which throws the whole of the first loss, or a definite proportion of any loss, on the insured. Such a condition is usual in the case of reinsurances¹ and insurances on farm premises and livestock. A common form of such condition, used particularly in motor insurance, requires the insured to bear the amount of any individual loss up to a specified figure, leaving the insurers with liability only for any excess over that figure². A similar condition is to be found in contractors' policies³.

1 *Traill v Baring* (1864) 4 De GJ & Sm 318; *Irish National Insurance Co Ltd v Oman Insurance Co Ltd* [1983] 2 Lloyd's Rep 453.

2 *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co Ltd's Case* [1914] 2 Ch 617 at 645, CA, per Scrutton J; *Beacon Insurance Co Ltd v Langdale* [1939] 4 All ER 204, CA; as to excess clauses in motor insurance see PARA 727 post.

3 *Trollope and Colls Ltd v Haydon* [1977] 1 Lloyd's Rep 244, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(1) NATURE OF MARINE INSURANCE/215. The Marine Insurance Act 1906.

3. MARINE INSURANCE

(1) NATURE OF MARINE INSURANCE

215. The Marine Insurance Act 1906.

The Marine Insurance Act 1906 is an Act to codify the common law relating to marine insurance. However, it expressly provides that, save in so far as they are inconsistent with the provisions of the Act, the rules of the common law and the law merchant continue to apply to marine insurance¹. Although the Act relates specifically to marine insurance many of its provisions have been held to apply equally to non-marine insurance².

1 Marine Insurance Act 1906 s 91(2); and see PARA 14 ante.

2 See eg *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL; *Economides v Commercial Union Assurance Co plc* [1998] QB 587, [1997] 3 All ER 636, CA; *Printpak (a firm) v AGF Insurance Ltd* [1999] 1 All ER (Comm) 466, [1999] Lloyd's Rep IR 542, CA; *Quorum A/S v Schramm* [2002] 1 Lloyd's Rep 249; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(1) NATURE OF MARINE INSURANCE/216. Meaning of 'contract of marine insurance'.

216. Meaning of 'contract of marine insurance'.

A contract of marine insurance is defined by the Marine Insurance Act 1906 as a contract whereby the insurer undertakes to indemnify the assured¹, in manner and to the extent thereby agreed, against marine losses, that is to say losses incident to marine adventure². The instrument in which the contract of marine insurance is generally embodied is called a policy³. The insurer is usually called the underwriter, because he subscribes the policy. The thing or property insured is called the subject matter of insurance, and the assured's interest in that subject matter is called his insurable interest. The consideration for which the insurer undertakes to indemnify the assured is called the premium. That which is insured against is the loss arising from maritime perils⁴ and casualties, and these are called the perils insured against, or the losses covered by the policy. When the underwriter's liability commences under the contract, the policy is said to attach; or, in other words, the risk is said to attach or to begin to run from that time.

1 The person indemnified under a contract of marine insurance is referred to throughout the Marine Insurance Act 1906, and by those engaged in or connected with the business of marine insurance, as 'the assured' and not 'the insured'. A contract of insurance is not a perfect contract of indemnity, for, as will be seen (see PARAS 441, 495-497 post), the assured in some cases receives more and in others less than a complete indemnity; see also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255. Where a contract which is substantially one of marine insurance contains an ancillary clause covering the assured's liability to third parties, the special rules governing the contract of marine insurance will be held applicable to this ancillary clause: *Holman & Sons Ltd v Merchants' Marine Insurance Co Ltd* [1919] 1 KB 383, distinguishing *Joyce v Kennard* (1871) LR 7 QB 78, and *Cunard Steamship Co Ltd v Marten* [1902] 2 KB 624 (affd [1903] 2 KB 511, CA).

2 Marine Insurance Act 1906 s 1. For the meaning of 'marine adventure' see PARA 217 post.

3 See PARA 220 et seq post.

4 For the meaning of 'maritime perils' see PARA 217 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(1) NATURE OF MARINE INSURANCE/217. Subject matter of the insurance.

217. Subject matter of the insurance.

The most usual insurances are on ship or goods, freight or profits, but every lawful marine adventure may be the subject of a contract of marine insurance¹. In particular, there is a marine adventure where any insurable property, namely any ship², goods or other movables³, is exposed to maritime perils⁴, or where the earning or acquisition of any freight⁵, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loan or disbursements, is endangered by the exposure of insurable property to maritime perils⁶, or where any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property by reason of maritime perils⁷.

'Maritime perils' means perils consequent on, or incidental to, the navigation of the sea, that is to say perils of the seas, fire, war perils⁸, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy⁹.

Thus, a carrier of goods by sea, a charterer of a vessel and a company which lays down an undersea electric cable are all engaged in marine adventures¹⁰.

1 Marine Insurance Act 1906 s 3(1). For the meaning of 'contract of marine insurance' see PARA 216 ante.

2 In the Marine Insurance Act 1906 'ship' includes hovercraft: Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1 Pt A. See also PARA 294 post.

3 'Movables' means any movable tangible property, other than the ship, including money, valuable securities and other documents: Marine Insurance Act 1906 s 90.

4 Ibid s 3(2)(a). As to maritime perils see text and notes 8-9 infra.

5 'Freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money: ibid s 90. See also PARA 296 post.

6 Ibid s 3(2)(b).

7 Ibid s 3(2)(c).

8 War perils are usually known as 'war risks'. Those perils, in so far as they are maritime in their nature, are properly insured against under a marine policy, notwithstanding that for certain special purposes it is necessary to distinguish between 'marine' and 'war' risks. There is statutory provision for the insurance of war risks by the Secretary of State and for the reinsurance by him of those risks: see PARA 808 et seq post.

9 Marine Insurance Act 1906 s 3(2). The meaning of the particular perils referred to is discussed in PARA 332 et seq post.

10 *Crowley v Cohen* (1832) 3 B & Ad 478 (carrier); *Paterson v Harris* (1861) 1 B & S 336 at 355; *Wilson v Jones* (1867) LR 2 Exch 139 (shareholder in cable company).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(1) NATURE OF MARINE INSURANCE/218. Land risks.

218. Land risks.

A contract of marine insurance¹ may, by its express terms or by trade usage, be extended so as to protect the assured against losses on inland waters or against any land risk which may be incidental to a sea voyage, and it may also cover a ship² in the course of building, or the launch of a ship, or any adventure analogous to a marine adventure³.

Generally speaking, the underwriter of a marine policy insures only against risks at sea, but where there is a usage by which the ship's furniture or stores are regularly landed at a certain stage of the voyage, they are held to be protected when thus put on shore⁴.

A policy on goods often contains a 'transit' clause⁵. Frequently, also, goods are insured by the same policy for transit partly by sea and partly by land⁶, or by inland navigation⁷.

1 For the meaning of 'contract of marine insurance' see PARA 216 ante.

2 'Ship' includes hovercraft: see PARA 217 note 2 ante.

3 See the Marine Insurance Act 1906 s 2. See also *Jackson v Mumford* (1904) 9 Com Cas 114 (vessel in course of construction); *James Yachts Ltd v Thames and Mersey Marine Insurance Co Ltd* [1977] 1 Lloyd's Rep 206, BC SC (boat builders' risk policy). For the meaning of 'marine adventure' see PARA 217 ante.

4 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341; *Brough v Whitmore* (1791) 4 Term Rep 206.

5 As to the wording of this clause see PARA 306 post.

6 *Rodoconachi v Elliott* (1874) LR 9 CP 518, Ex Ch; *Simon, Israel & Co v Sedgwick* [1893] 1 QB 303, CA; *Hyderabad (Deccan) Co v Willoughby* [1899] 2 QB 530; *Robinson Gold Mining Co v Alliance Insurance Co* [1904] AC 359, HL; *Schloss Bros v Stevens* [1906] 2 KB 665, CA; *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, HL; *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA. For a clause by which goods were covered while temporarily placed on a quay see *Ide and Christie v Chalmers and White* (1900) 5 Com Cas 212.

7 *Apollinaris Co v Nord Deutsche Insurance Co* [1904] 1 KB 252; *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(1) NATURE OF MARINE INSURANCE/219. Pollution by oil.

219. Pollution by oil.

Certain ships must be insured in respect of liability for pollution by oil¹. A certificate that the ship is so insured must be in force before it may enter or leave a port or terminal in the United Kingdom or, in certain cases, a foreign port or terminal². Where it is alleged that the shipowner has incurred a liability as a result of any discharge or escape of oil occurring, or as a result of any threat of contamination arising, while there was in force a contract of insurance or other security to which such a certificate related, proceedings to enforce a claim in respect of the liability may be brought against the insurer³. In those proceedings it is a defence, in addition to any defence affecting the owner's liability, to prove that the discharge or escape, or the threat of contamination, was due to the wilful misconduct of the owner himself⁴. The insurer may limit his liability in respect of claims made against him by virtue of these provisions in like manner and to the same extent as the owner may limit his liability; but the insurer may do so whether or not the discharge or escape, or the threat of contamination, resulted from acts done or omitted to be done by the owner with intent to cause damage or cost, or recklessly and in the knowledge that damage or cost would probably result⁵.

1 See the Merchant Shipping Act 1995 s 163(1), (2); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1066.

2 Ibid s 163(2); see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1066. For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

3 Ibid s 165(1); see SHIPPING AND MARITIME LAW.

4 Ibid s 165(2); see SHIPPING AND MARITIME LAW.

5 Ibid s 165(3). Where the owner and the insurer each apply to the court for the limitation of his liability, any sum paid into court in pursuance of either application is to be treated as paid also in pursuance of the other: s 165(4). The Third Parties (Rights against Insurers) Act 1930 (see PARAS 678-684 post) does not apply in relation to any contract of insurance to which a certificate under the Merchant Shipping Act 1995 s 163 relates: s 165(5). See SHIPPING AND MARITIME LAW.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(i) The Policy/220. Contents and admissibility.

(2) INSURANCE POLICIES

(i) The Policy

220. Contents and admissibility.

Marine policies vary greatly in form and in the clauses they contain, but every policy must specify the name of the assured or of some person who effects the insurance on his behalf¹. Subject to any statutory provisions, a contract of marine insurance² is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Marine Insurance Act 1906³. The policy may be executed and issued either at the time when the contract is concluded or afterwards⁴.

1 Marine Insurance Act 1906 s 23(1).

2 For the meaning of 'contract of marine insurance' see PARA 216 ante.

3 Marine Insurance Act 1906 s 22. The contract contained in an insurance slip is therefore unenforceable: *Fisher v Liverpool Marine Insurance Co* (1874) LR 9 QB 418; see PARA 270 post.

4 Marine Insurance Act 1906 s 22.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(i) The Policy/221. Subscription.

221. Subscription.

A marine policy must be signed by or on behalf of the insurer¹. In the case of a corporation the corporate seal is sufficient, but the subscription of a corporation is not required to be under seal²; the form of execution may be infinitely varied by the statute, charter, deed or memorandum of association under which a company is constituted or the articles of association by which it is regulated³.

1 Marine Insurance Act 1906 s 24(1). Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary is expressed, constitutes a distinct contract with the assured: s 24(2); see PARA 24 ante.

2 Ibid s 24(1).

3 See *Reid v Allan*, *Cross v Allan* (1849) 4 Exch 326; *Dowdall v Allan*, *Dowdall v Clark* (1849) 19 LJQB 41. As to the execution of contracts by corporations see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1272.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(i) The Policy/222. Types of policy.

222. Types of policy.

A marine policy may be made for a voyage, or for time, or both for a voyage and for time; in addition, it may be a floating policy¹. Further, a policy may be valued or unvalued², or valued as to part of the subject matter insured and unvalued as to the remainder.

A voyage policy is one where the contract is to insure the subject matter 'at and from' or from one place to another or others; and a policy is a time policy where the contract is to insure the subject matter for a definite period of time³.

A floating policy is one which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration⁴. There are also floating policies which cover shipments of goods made on a given ship within a certain period of time fixed by the policy, as declared by the assured; but such floating policies are really insurances of goods for a series of voyages⁵.

A valued policy is a policy which specifies the agreed value of the subject matter insured⁶; an unvalued policy is one which does not specify the value of the subject matter insured but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained⁷.

1 See the text and notes infra.

2 Marine Insurance Act 1906 s 27(1).

3 Ibid s 25(1). The word 'definite' means 'specified'. The period is sufficiently specified if the policy specifies a stated period, even though that period is determinable on notice, and even though the insurance will be renewed or continued automatically at the end of the period unless determined, or will continue under a continuation clause: *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49, [1976] 3 All ER 243, CA. As to continuation clauses see PARA 302 post. A contract for both voyage and time may be included in the same policy: Marine Insurance Act 1906 s 25(1); see PARA 305 post. In *Wilson v Boag* [1956] 2 Lloyd's Rep 564, NSW SC, a policy covering a motor launch for four and a half months within a limited radius was held to be a time policy and not a mixed policy. In *M Almojil Establishment v Malayan Motor and General Underwriters (Pte) Ltd, The Al Jubail IV* [1982] 2 Lloyd's Rep 637, Sing CA, where a vessel was insured for 12 months from and on the voyage from Singapore to the Persian Gulf and while trading within the Gulf, it was held that the policy was a 'mixed policy'.

4 Marine Insurance Act 1906 s 29(1); see further PARA 290 post.

5 See *Johnson & Co Ltd v Bryant* (1896) 12 TLR 368.

6 Marine Insurance Act 1906 s 27(2); see further PARA 223 post.

7 Ibid s 28; *Kyzuna Investments Ltd v Ocean Marine Mutual Insurance Association (Europe)* [2000] 1 Lloyd's Rep 505, [2000] Lloyd's Rep IR 513. As to the ascertainment of the insurable value see PARA 431 et seq post. See also *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442. Unvalued policies are rare.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(i) The Policy/223. Attributes of valued policy.

223. Attributes of valued policy.

The difference in form between a valued policy and an unvalued policy¹ is that in a valued policy the valuation clause is filled up with the sum at which the parties agree to value the subject matter insured, whereas in an unvalued policy it is left blank. The difference in legal effect between the two policies is that in the case of an unvalued policy the value of the subject matter insured is not admitted but has to be subsequently ascertained, whereas in the case of a valued policy, unless it is voidable on the ground of fraud or for some other reason², the value fixed by the policy is, as between the insurer and the assured, conclusive of the value of the subject intended to be insured whether the loss is total or partial³. Thus, if a ship that has been worth £800,000 is so damaged that she is not worth repairing, but, this fact being unknown to the assured, he effects an insurance upon her, whilst in that condition, by a policy for £600,000 valued at £800,000, and after the policy has attached the vessel is wholly destroyed by a storm, the valuation is binding and the assured is entitled to recover £600,000⁴.

1 For the meanings of 'valued policy' and 'unvalued policy' see PARA 222 ante.

2 As to the avoidance of policies see PARA 390 et seq post.

3 Marine Insurance Act 1906 s 27(3). The value fixed by the policy is not, however, unless the policy otherwise provides, conclusive for determining whether there has been a constructive total loss: s 27(4); and see PARA 473 post.

4 *Barker v Janson* (1868) LR 3 CP 303; *Woodside v Globe Marine Insurance Co Ltd* [1896] 1 QB 105. Subject as indicated in note 3 supra, the valuation is binding generally, and not merely in cases where the question is as to the amount payable by underwriters in case of loss, for the valuation constitutes as between the parties a conclusive admission as to the value of the subject matter to which it refers: *Muirhead v Forth and North Sea Steamboat Mutual Insurance Association* [1894] AC 72 at 79, HL. It has been held, for example, to be binding on the parties to the contract with reference to questions of general average, contribution and subrogation: *Balmoral Steamship Co v Marten* [1902] AC 511, HL; *North of England Iron SS Insurance Association v Armstrong* (1870) LR 5 QB 244; and see also *Loders and Nucoline Ltd v Bank of New Zealand* (1929) 45 TLR 203. Where a policy on goods 'and/or advance freight valued at £26,025' contained a clause stating 'claims if any to pay at the rate of \$4.15 to the £ sterling' but also contained a clause providing for payment of a total loss in sterling, it was held that the former clause had no application to a claim for total loss, but must be treated as applying only to claims for expense which might have been incurred in dollars: *Howard, Houlder & Partners v Union Marine Insurance Co Ltd* (1922) 38 TLR 515, HL. The use of the words 'sum insured' did not make a policy a valued policy; these words ordinarily indicate a ceiling on recovery in an unvalued policy: *Kyzuna Investments Ltd v Ocean Marine Mutual Insurance Association (Europe)* [2000] 1 Lloyd's Rep 505, [2000] Lloyd's Rep IR 513; cf *Quorum A/S v Schramm* [2002] 1 Lloyd's Rep 249, [2002] Lloyd's Rep IR 292.

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224. Opening of valuation.

The parties are, however, only bound by the valuation as far as it goes, and it is therefore always permissible for the underwriter to show that part only of the subject matter intended to be valued in the policy was actually at risk¹. For instance, if the insurance is on a cargo valued at £300,000 and the goods at risk amounted to only half a cargo, the underwriter in case of a total loss is liable only for £150,000. Similarly, if freight is valued at £600,000 and is intended to be freight for a full cargo, and only one-half of such a full cargo is loaded, the underwriter in case of total loss is liable only for £300,000. In this sense, and to this extent only, can the valuation be opened in the foregoing and similar cases². The question as to what was intended to be valued in the valuation clause depends upon the parties' intention, and that intention is to be ascertained from the words of the clause having regard to the circumstances under which the contract of insurance was made³.

1 Marine Insurance Act 1906 s 75(2).

2 In the following cases the valuation was opened because the whole of the subject intended to be valued was not at risk: *Forbes v Aspinall* (1811) 13 East 323 at 327 (freight); *Rickman v Carstairs* (1833) 5 B & Ad 651; *Tobin v Harford* (1864) 17 CBNS 528, Ex Ch (goods). See also note 3 infra.

3 *Williams v North China Insurance Co* (1876) 1 CPD 757, CA; *Denoon v Home and Colonial Assurance Co* (1872) LR 7 CP 341; *The Main* [1894] P 320. In club insurances on freight it is common to include a clause stating that 'in the event of the total loss of a ship, the amount insured shall be deemed the owner's interest at risk, and he shall be paid such amount whether the vessel be loaded, in ballast or under charter'. Such a clause amounts to a binding valuation of the freight covering whatsoever may be the nature of the freight lost by reason of the total loss of the ship. As to mutual insurance clubs see PARAS 517-522 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(i) The Policy/225. Lloyd's policy.

225. Lloyd's policy.

The forms of marine policy are numerous, but almost all policies effected in the United Kingdom were framed on the model of a policy called the 'Lloyd's policy', which is recognised in and scheduled to the Marine Insurance Act 1906¹. Most of the law of marine insurance is, in essence, pure interpretation of the contract contained in the common form of marine policy².

The language used in this policy, which in its essentials was introduced into England over three centuries ago, was both ungrammatical and obscure³ and was not intelligible without the aid of usage and judicial decisions; but its meaning was determined by certain rules of construction, as well as by usage and statutory provisions subject to the provisions of the Marine Insurance Act 1906, and unless the context of a policy otherwise requires, the terms and expressions mentioned in the statutory rules for the construction of a policy of marine insurance in the form scheduled to the Act⁴, or in other like form, have the scope and meaning assigned to them by those rules⁵.

In 1982 a new form of Lloyd's Marine Policy was adopted⁶. It is used in connection with the Institute Clauses issued by the Institute of London Underwriters and revised from time to time⁷.

1 See the Marine Insurance Act 1906 s 30(1), Sch 1. See, however, text and notes 6-7 infra.

2 *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 34, [1936] 2 All ER 242 at 269, CA, per Scott LJ.

3 *Marsden v Reid* (1803) 3 East 572 at 579 per Lawrence J; *Le Cheminant v Pearson* (1812) 4 Taunt 367 at 380 per Mansfield CJ; *Forestal Land, Timber and Railways Co Ltd v Rickards* [1941] KB 225 at 246-247, [1940] 4 All ER 395 at 403, CA, per MacKinnon LJ (affd sub nom *Rickards v Forestal Land, Timber and Railways Co Ltd* [1942] AC 50, [1941] 3 All ER 62, HL).

4 The form of the policy, and the rules governing its construction, are contained in the Marine Insurance Act 1906 Sch 1; the rules are cited in the various places in this title where the expressions concerned are considered.

5 Ibid s 30(2).

6 The policies issued by marine insurance companies are in a similar form.

7 The most important of these clauses are the Institute Time Clauses (Hulls), the Institute Voyage Clauses (Hulls), the Institute Time Clauses (Freight), the Institute Voyage Clauses (Freight), the Institute Cargo Clauses (A), the Institute Cargo Clauses (B), the Institute Cargo Clauses (C), the Institute War and Strikes Clauses (Hulls-Time), the Institute War and Strikes Clauses (Freight-Time), the Institute War and Strikes Clauses (Freight-Voyage), the Institute War Clauses (Cargo) and the Institute Strike Clauses (Cargo).

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(ii) Construction of Marine Policies

226. General principles.

A contract of marine insurance¹ is to be construed, like all other commercial instruments², so as to give effect to the parties' intention as expressed in the written contract³. The most general rule of construction is that the policy is to be construed according to its sense and meaning, as collected in the first place from the terms used in it⁴; and these terms are to be understood in their plain, ordinary and popular sense⁵, unless they have by the known usage of trade acquired a peculiar meaning distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the parties' immediate intention, be understood in some other special and peculiar sense⁶.

1 For the meaning of 'contract of marine insurance' see PARA 216 ante.

2 The construction of written instruments in general is considered in DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

3 *Carr v Montefiore* (1864) 5 B & S 408 at 428, Ex Ch, per Erle CJ; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1989] 1 All ER 402, HL; *Hitchens (Hatfield) Ltd v Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580, 60 BLR 51, CA; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, [1996] 3 All ER 46, HL; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 177. On the question whether a contract made abroad should be construed by English or foreign law see CONFLICT OF LAWS; and *Royal Exchange Assurance Corp v Sjoforsakrings Akt Vega* [1901] 2 KB 567 at 574 (affd [1902] 2 KB 384 at 393, CA); *Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 All ER 347.

4 The slip is admissible as an aid to the interpretation of the policy: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep 161, [2001] Lloyd's Rep IR 596, doubting *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, CA. As to the slip see PARA 270 post.

5 See eg *Bristol Steamship Corp v London Assurance and Linard, The Delfini* [1976] 2 Lloyd's Rep 741, Dist Ct, Southern Dist NY, where the words 'port risk' were held to mean 'a risk upon a vessel lying in port and before she has taken her departure on another voyage'; *Stolos Compania SA v Ajax Insurance Co Ltd, The Admiral C* [1981] 1 Lloyd's Rep 9, CA, where a term in the policy which stated that claims were to be 'collected' through certain brokers was held to mean 'collected in cash', and not 'brought into account between brokers and insurers in the manner customary in the market'; *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24, [1996] CLC 1728, CA; *Zeus Tradition Marine Ltd v Bell* [2000] 2 All ER (Comm) 769, CA, where it was held that 'survey' should be read as 'survey or surveys'.

6 *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ, applied in *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499 at 501, CA; *Birrell v Dryer* (1884) 9 App Cas 345, HL. See CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 653-654; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 172-174.

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NOTE 3--See *IF P & C Insurance Ltd (Publ) v Silversea Cruises Ltd* [2004] EWCA Civ 769, [2004] Lloyd's Rep IR 696 (insurance policy imposed claim limit per event, per insured period; on proper construction, maximum annual aggregate was for fleet, not per vessel).

NOTE 4--See *Allianz Insurance Co Egypt v Aigaion Insurance Co SA* [2008] EWCA Civ 1455, [2009] Lloyd's Rep IR 533, [2008] All ER (D) 234 (Dec) (slip is intended to be definitive reference point of terms of the contract).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(ii) Construction of Marine Policies/227. Printed and written words.

227. Printed and written words.

One of the most important of the rules of construction which have reference only to the words actually used, and not to the admission of extrinsic evidence for the purpose of explaining or adding to the contract, is that full effect must, if possible, be given to every provision, written or printed, contained in the policy, even though it may be one which the assured would have rejected had it been present to his mind at the time of his entering into the contract¹. Greater weight is, in case of inconsistency², given to a written than to a printed clause, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects³.

Printed words will, therefore, be considered as struck out if they are completely inconsistent with the written words, or if it is clear that the latter were to be in substitution for the former⁴. For a similar reason no effect will be given to a printed clause in a policy where it is inconsistent with the object and purpose of the insurance⁵. Thus, no effect will be given to the suing and labouring clause contained in a policy of reinsurance which also contains a written clause excluding liability for salvage charges⁶, or in a policy indemnifying the shipowners against liability to owners of cargo for negligence⁷.

1 *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL; *Haughton v Empire Marine Insurance Co* (1866) LR 1 Exch 206; *Calmar Steamship Corp v Scott, The Portman* [1953] 1 Lloyd's Rep 485 at 488, US SC, per Frankfurter J ('construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts').

2 *Gumm v Tyrie* (1864) 4 B & S 680 at 707 per Crompton J (affd (1865) 6 B & S 298, Ex Ch).

3 *Robertson v French* (1803) 4 East 130 at 136; *Joyce v Realm Marine Insurance Co* (1872) LR 7 QB 580 at 583 per Blackburn J; *Dudgeon v Pembroke* (1877) 2 App Cas 284 at 293, HL, per Lord Penzance; *Eurodale Manufacturing Ltd (t/a Connekt Cellular Communications) v Ecclesiastical Insurance Office plc* [2003] EWCA Civ 203, [2003] All ER (D) 106 (Feb); cf *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 168, [1956] 3 All ER 957 at 965, HL, per Lord Morton of Henryton; and *Glynn v Margetson & Co* [1893] AC 351, HL. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 211.

4 Cf *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 1 QB 462 at 501, [1956] 1 All ER 209 at 222, CA, per Jenkins LJ (where there is not complete repugnancy between written words and the printed form the court will limit or modify the conflicting printed words); affd [1957] AC 149, [1956] 3 All ER 957, HL.

5 *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500, CA (clause as to commencement of risk); and see *Dudgeon v Pembroke* (1877) 2 App Cas 284 at 293, HL; contrast *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73 ('premises' in fire policy applied to ship); *Bensaude v Thames and Mersey Marine Insurance Co* [1897] AC 609 at 613, HL; *Marten v Vestey Bros Ltd* [1920] AC 307, HL. In the last-named case, Lords Haldane and Atkinson thought that in attempting to discover the duration of the risk in a policy on a ship, conclusions might be drawn from the printed words relating to goods. Lord Dunedin strongly dissented from this view. Printed clauses attached to the policy will probably be given greater weight in cases of inconsistency than the printed clauses in the body of the policy.

6 *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376. As to the suing and labouring clause see PARAS 435-438 post.

7 *Cunard Steamship Co Ltd v Marten* [1903] 2 KB 511, CA (affg [1902] 2 KB 624 at 627 per Walton J, applied in *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376).

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NOTE 3--*Eurodale*, cited, reported at [2003] Lloyd's Rep IR 444.

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228. Surrounding circumstances.

Another general rule of construction is that, in interpreting an instrument, all the surrounding circumstances known to the parties at the time of the making of the contract must be looked at¹. Where the words of the contract are ambiguous, the acts, conduct and course of dealing of the parties before and at the time they entered into it may and should be considered and taken into account with a view to discovering the parties' intention as expressed by them in the contract².

1 *Carr v Montefiore* (1864) 5 B & S 408 at 428, Ex Ch, per Erle CJ; *Lewis v Great Western Rly Co* (1877) 3 QBD 195 at 208, CA (forwarding note); *Gurney v Grimmer* (1932) 38 Com Cas 7, CA (history of reinsurance clause considered in construing current form of the clause); *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, [1996] 3 All ER 46, HL.

2 *Houlder Bros & Co Ltd v Public Works Comr, Public Works Comr v Houlder Bros & Co Ltd* [1908] AC 276 at 285, PC (demurrage clause in contract of sale); *Bank of New Zealand v Simpson* [1900] AC 182 at 188, PC; *Montefiore v Lloyd* (1863) 15 CBNS 203; *Leathley v Spyer* (1870) LR 5 CP 595, which were actions on contracts guaranteeing that an employee would duly pay over money received, and decided entirely by reference to the surrounding circumstances. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 198.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(ii) Construction of Marine Policies/229. Technical words.

229. Technical words.

Words used in a policy may be technical words not employed in ordinary language; in that case evidence may be given of their technical meaning. Although the words used may have an ordinary meaning, evidence may nevertheless be adduced to show that they have a different and peculiar meaning in insurance business or in the export or import trade to which the particular insurance relates, and effect will be given to that secondary meaning unless it appears from the circumstances of the case or the terms of the policy that this was not the parties' intention¹. Again, it may be shown that the word 'port' has in the business sense a more or less extensive meaning than its legal or political limits, and in that case effect will be given to its business sense².

¹ *Mason v Skurray* (1780) 1 Park's Marine Insurances (8th Edn) 253. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 172, 202.

² *Constable v Noble* (1810) 2 Taunt 403; *Payne v Hutchinson* (1810) 2 Taunt 405n; *Cockey v Atkinson* (1819) 2 B & Ald 460; *Brown v Tayleur* (1835) 4 Ad & El 241; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, CA, per Brett MR; *Hunter v Northern Marine Insurance Co* (1888) 13 App Cas 717 at 733, HL, per Lord Watson. As to the meaning of 'port' see PARA 314 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(ii) Construction of Marine Policies/230. Geographical terms.

230. Geographical terms.

Where words descriptive of seas or countries have among businessmen a sense differing from their common or geographical import, evidence of their business meaning is admissible, and effect will be given to that meaning¹. Thus, where an insurance is effected 'from London to any port in the Baltic', although according to geographers the Gulf of Finland is not included in the Baltic, on evidence showing that it is included in the Baltic in commercial parlance the court will give this extended meaning to the term 'Baltic' in the policy².

¹ *Uhde v Walters* (1811) 3 Camp 16; *Moxon v Atkins* (1812) 3 Camp 200; *Royal Exchange Assurance Corp'n v Tod* (1892) 8 TLR 669; and see CUSTOM AND USAGE VOL 12(1) (Reissue) PARAS 665 et seq. In the following cases the attempt to prove a special business meaning was unsuccessful: *Robertson v Clarke* (1824) 1 Bing 445 at 451; *Northey v Trevillion* (1902) 7 Com Cas 201; *Birrell v Dryer* (1884) 9 App Cas 345, HL; and see *Houghton v Gilbart* (1836) 7 C & P 701 (dictionary insufficient evidence).

² *Uhde v Walters* (1811) 3 Camp 16.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(ii) Construction of Marine Policies/231. Special rules.

231. Special rules.

The following rules, of a more special and limited character, are often applied to policies of insurance. Where a particular list of causes is followed by such words as 'or other', the latter expression must in some cases be limited to matters ejusdem generis¹. Again, there is an important rule of construction that marine insurance contracts only extend to cover losses proximately caused by the perils insured against².

Moreover, where there is a latent ambiguity as to the subject matter of the policy, external evidence is admissible for the purpose of identifying it³. Finally, where an ambiguity cannot be removed by any other rule of construction the contra proferentem rule⁴ may be applied⁵, it being, however, left for determination in each case, as regards any special provision in the policy, whether the assured or the insurers are to be considered the *proferentes* within the meaning of the rule⁶.

1 For a full explanation of this rule see Lord Watson's judgment in *Sun Fire Office v Hart* (1889) 14 App Cas 98 at 103, PC; and see *Bolivia Republic v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, CA. For a general consideration of the ejusdem generis rule see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 234.

2 As to this rule see PARAS 356-357 post.

3 *Macdonald v Longbottom* (1860) 1 E & E 977, Ex Ch; *Irving v Richardson* (1831) 2 B & Ad 193; *Bank of New Zealand v Simpson* [1900] AC 182, PC; cf *Birrell v Dryer* (1884) 9 App Cas 345, HL, where the court found no ambiguity. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 209.

4 I.e. the maxim *verba cartarum fortius accipiuntur contra proferentem*: the words of deeds are to be interpreted most strongly against him who uses them. As to this maxim see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179.

5 *Fowkes v Manchester and London Life Assurance and Loan Association* (1863) 3 B & S 917 at 929; *Thomson v Weems* (1884) 9 App Cas 671 at 687, HL; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 596, CA; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, CA; *Zeus Tradition Marine Ltd v Bell* [2000] 2 All ER (Comm) 769, CA; *Capital Coastal Shipping Corp'n and Bulk Towing Corp'n v Hartford Fire Insurance Co (United States of America, third party), The Cristie* [1975] 2 Lloyd's Rep 100, Dist Ct, Eastern Dist Virginia (where a warranty stated that a particular person should be the master of the vessel, the warranty was not construed contra proferentem because the evidence indicated that the assured had a clear understanding of its importance and operation and could not therefore contend that it was too vague).

6 It has been said that in dealing with the construction of policies, whether life, fire or marine, an ambiguous clause must be construed against rather than in favour of the insurer (*Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 596, CA, per Vaughan Williams LJ); but it is submitted that this proposition is inconsistent with the judgments in *Birrell v Dryer* (1884) 9 App Cas 345, HL, and with the other authorities cited in note 5 supra, at any rate as regards marine policies, which (unlike fire and life policies) are framed in accordance with the slip prepared by the assured's broker (see PARA 270 post). See also *Stewart & Co v Merchants Marine Insurance Co Ltd* (1885) 16 QBD 619 at 626-627, CA, per Lord Esher MR; *Bartlett & Partners Ltd v Meller* [1961] 1 Lloyd's Rep 487; and PARA 87 ante. The last sentence of the text in an earlier edition of this work was approved by Maugham LJ in *A S Ocean v Black Sea and Baltic General Insurance Co Ltd* (1935) 51 Ll L Rep 305 at 310, CA. See also per Greer LJ at 307.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iii) Usage/232. Evidence of usage.

(iii) Usage

232. Evidence of usage.

The language of a marine policy is so general and indeterminate that it requires, in a far greater degree than most other commercial contracts, to be supplemented by evidence of usage¹. Such evidence is admissible not merely for the purpose of explaining ambiguous terms in the contract², but also for the purpose of adding incidents to it subject, however, always to the following two conditions, namely that:

- 67 (1) the usage must not be inconsistent with the express terms of the contract³; and
- 68 (2) it must be general and notorious in insurance business, or in the particular trade to which the contract relates, and not unreasonable⁴.

Thus, looking at a policy it will be found that the voyage insured is mainly defined by naming the port of departure and the port of destination so that the course to be pursued by the vessel on the voyage between those two ports must necessarily be determined by usage. What is usually done on the insured voyage with reference to ship or cargo is understood to be implied in every policy and to make a part of it as if it were expressed in it⁵. In accordance with this principle, intermediate voyages and goods landed and stored are held to be covered by the policy if there is a general and well-known usage for ships engaged on the insured voyage to make such intermediate voyages, or for goods to be landed and stored in the course of it⁶.

1 The nature of usages, their admission in evidence, and the proof required is discussed generally in CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 677-686. As to particular marine insurance usages see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 694.

2 As to an example of reference to usage for explaining the terms of a policy see *Otago Farmers' Co-op Association of New Zealand v Thompson* [1910] 2 KB 145.

3 Where any right, duty or liability would arise under a contract of marine insurance by implication of law, it may be negated or varied by express agreement, or by usage, if the usage is such as to bind both parties to the contract (Marine Insurance Act 1906 s 87(1)), and this provision extends to any right, duty or liability declared by that Act which may be lawfully modified by agreement (s 87(2)).

4 See further PARA 234 post.

5 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341 at 350 per Lord Mansfield.

6 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341; *Tierney v Etherington* (1743), cited in *Pelly v Royal Exchange Assurance Co* supra at 348 (as to storing goods). As to the effect of usages existing in the Newfoundland trade see *Noble v Kennoway* (1780) 2 Doug KB 510; *Vallance v Dewar* (1808) 1 Camp 503; *Ougier v Jennings* (1800) 1 Camp 504n per Lord Eldon CJ. As to usages in the China and East Indian trades see *Pelly v Royal Exchange Assurance Co* supra; *Brough v Whitmore* (1791) 4 Term Rep 206; *Salvador v Hopkins*, *Heaton v Rucker* (1765) 3 Burr 1707; *Gregory v Christie* (1784) 3 Doug KB 419; *Farquharson v Hunter* (1785) 1 Park's Marine Insurances (8th Edn) 105. Many illustrations of the same principle will be found in the section on deviation, duration and commencement of the risk (see PARA 302 et seq post), where it is shown that deviation may be justified by usage, and that the commencement and duration of the risk may be affected by the usages of maritime trade and business. See also *Kingston v Knibbs* (1808) 1 Camp 508n; *Moxon v Atkins* (1812) 3 Camp 200; *Brown v Carstairs* (1811) 3 Camp 161; and CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 692-694.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iii) Usage/233. Usage consistent with express terms.

233. Usage consistent with express terms.

No usage will be allowed to affect a contract of insurance unless it is consistent with the express terms of the contract; in other words, evidence of usage is never admissible to contradict what is plain¹. Thus, where the risk on goods is expressed by the policy to be 'till discharged and safely landed', evidence of usage will not be admitted to show that this clause means, in the particular trade insured, until the ship was moored 24 hours in safety, because this is inconsistent with the plain language of the policy².

¹ *Blackett v Royal Exchange Assurance Co* (1832) 2 Cr & J 244 at 249 per Lord Lyndhurst CB; *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224 at 235; *Hall v Janson* (1855) 4 E & B 500; *Crofts v Marshall* (1836) 7 C & P 597 at 607; and see CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 665-667.

² *Parkinson v Collier* (1797) 2 Park's Marine Insurances (8th Edn) 653. It seems probable that an established usage cannot be excluded by oral agreement: see *Fawkes v Lamb* (1862) 31 LJQB 98; and the conflicting judgments of Blackburn J and Cockburn CJ in *Burges v Wickham* (1863) 3 B & S 669 at 685, 697. It is, however, not of much practical importance, as there is no reason why the policy should not be rectified if it is drawn up so as not to express the common intention of both parties: see *Xenos v Wickham* (1863) 14 CBNS 435 at 459, Ex Ch, per Blackburn J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iii) Usage/234. Usage to be general and notorious.

234. Usage to be general and notorious.

The usage, in order to be binding, must be general and notorious¹. It need not be a usage of the whole commercial world of which the court would take judicial notice², but the usage merely of a particular place or a particular class of persons is not binding on other persons unless they are shown to be cognisant of it and have contracted with reference to it³. The usage, however, need not be followed invariably at all times and by all persons in the trade; if it is notorious and prevails generally in the trade, the assured and underwriter are presumed to have notice of it and are bound by it⁴.

It is also immaterial that the trade itself is of recent origin; it is sufficient if the usage has existed in such circumstances that it may be fairly presumed to be known to persons engaged in the trade, and that contracts of insurance relating to it are made with reference to that usage⁵. In order to be binding, at any rate on persons not cognisant of it, the usage must be one which is not unreasonable⁶.

1 See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 657.

2 *Vallance v Dewar* (1808) 1 Camp 503.

3 *Bartlett v Pentland* (1830) 10 B & C 760 at 770 per Lord Tenterden CJ; *Gabay v Lloyd* (1825) 3 B & C 793; *Scott v Irving* (1830) 1 B & Ad 605; *Sweeting v Pearce* (1861) 9 CBNS 534; *Matveieff v Crossfield* (1903) 8 Com Cas 120; *Stewart v Aberdeen* (1838) 4 M & W 211, where the plaintiff's acquaintance with the usage of Lloyd's was proved; contrast *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901; *Provincial Insurance Co Ltd v Crowder* (1927) 27 Ll L Rep 28.

4 *Vallance v Dewar* (1808) 1 Camp 503; *Russell v Provincial Insurance Co Ltd* [1959] 2 Lloyd's Rep 275 ('breasting' not same as 'towing').

5 Evidence of usage in one trade is admissible to prove that the same usage is binding on those engaged in another trade of the same kind carried on in the same way: *Noble v Kennoway* (1780) 2 Doug KB 510.

6 *Ougier v Jennings* (1800) 1 Camp 504n; *Robinson v Mollett* (1875) LR 7 HL 802 at 817-818 per Brett J; and see CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 659-660. The Association of Average Adjusters holds meetings from time to time at which rules of practice are established, but as these rules are always intended to be altered or modified with reference to leading decisions they are not, if inconsistent with legal principles, binding on parties to the contract of insurance, unless they are expressly incorporated in the policy; see *Atwood v Sellar & Co* (1879) 4 QBD 342 at 363; affd (1880) 5 QBD 286 at 289, CA. The rules of the Association may be found on the Association's website.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/A. GENERAL NATURE/235. Nature of warranty.

(iv) Warranties

A. GENERAL NATURE

235. Nature of warranty.

In the statutory provisions as to marine insurance, a warranty means a promissory warranty, that is a warranty by which the assured¹ undertakes that some particular thing is or is not to be done or that some condition is to be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts². Thus, a warranty may be an undertaking that the thing insured is neutral property, or that the ship insured sailed on a certain day, or that all was well at a given time, or that the ship is to sail on or before a given day, or that she will depart with convoy in time of war, etc.

A warranty may be express or implied³. An express warranty does not exclude an implied warranty unless inconsistent with it⁴. Thus, if a policy on cattle provides that the fittings of a ship are to be approved by a Lloyd's surveyor and they are so approved by him, the warranty of seaworthiness is not excluded by the express provision as to the approval of the fittings⁵.

An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy⁶.

A warranty is implied if it is a condition implied by law such as, for example, a warranty in a voyage policy⁷ that the ship is seaworthy at the commencement of the voyage.

1 As to the use of the term 'the assured' see PARA 216 note 1 ante.

2 Marine Insurance Act 1906 s 33(1). For the distinction between warranties relating to the present and warranties relating to the future see *Agapitos v Agnew (No 2)* [2002] EWHC 1558 (Comm), [2003] Lloyd's Rep IR 54, [2002] All ER (D) 358 (Jul); *Groupama Insurance Co v Overseas Partners Re Ltd* [2003] EWHC 34 (Comm), [2003] All ER (D) 226 (Jan). The term 'warranty' in contracts of marine insurance must be distinguished from that term as used in other contracts. A warranty in relation to a marine insurance contract is the equivalent of a condition in the general law of contract; cf CONTRACT vol 9(1) (Reissue) PARA 993. As used in contracts of marine insurance, a warranty is expressed to be a promissory warranty (Marine insurance Act 1906 s 33(1)), and a condition (s 33(3)).

3 Ibid s 33(2). As to express warranties see PARAS 238-244 post. As to implied warranties see PARAS 245-256 post.

4 Ibid s 35(3).

5 *Sleigh v Tyser* [1900] 2 QB 333; *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234; cf *Greenock Steamship Co v Maritime Insurance Co Ltd* [1903] 1 KB 367 (affd [1903] 2 KB 657, CA).

6 Marine Insurance Act 1906 s 35(2); *Blackhurst v Cockell* (1789) 3 Term Rep 360; *Pawson v Barnevelt* (1778) 1 Doug KB 12 note 4; see *Bensaude v Thames and Mersey Marine Insurance Co* [1897] AC 609 at 612, HL, per Lord Halsbury. In *Yorkshire Insurance Co Ltd v Campbell* [1917] AC 218, PC, statements in a proposal form were held to be incorporated in the policy and to amount to a warranty. In *Edwards v Aberayron Mutual Ship Insurance Society* (1876) 1 QBD 563 at 586, 588, Ex Ch, Pollock B and Brett J expressed the view that extrinsic evidence is admissible to show what documents were intended by the parties to form one contract of insurance. This is questionable, however, unless the documents are connected by reference: see CONTRACT vol 9(1) (Reissue) PARA 690. As to express warranties see PARAS 238-244 post.

7 For the meaning of 'voyage policy' see PARA 222 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/A. GENERAL NATURE/236. Non-compliance with warranty.

236. Non-compliance with warranty.

The essential characteristic of a warranty is that it is a condition which must be exactly complied with, whether it is material to the risk or not¹. If it is not complied with then, subject to any express provision in the policy² and to the effect of waiver of the breach by the insurer³, the insurer is discharged from liability as from the date of the breach of warranty but without prejudice to any liability incurred by him before that date⁴. Discharge from liability is automatic and is not dependent on any decision by the insurer to treat the policy as at an end⁵. Furthermore, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss⁶.

Any inquiry into the materiality or immateriality of the risk is entirely precluded, and so are all questions whether there has or has not been a substantial compliance with the warranty; where a warranty has been broken, even though the loss may not have been in the remotest degree connected with the breach, the underwriter is none the less discharged on that account from all liability for the loss⁷. Thus, where a ship warranted to sail with convoy in fact sails without it and is lost in a storm, the underwriter is not liable for the loss⁸.

Subject to the two exceptions mentioned subsequently⁹, no cause, however irresistible, will excuse non-compliance with a warranty, not even the direct and unavoidable operation of a peril expressly insured against. In short, the warranty is an absolute condition precedent¹⁰. A breach of warranty, whether express or implied, discharges the insurer from liability as from the date of the breach, and therefore altogether if the breach takes place at the commencement of the risk¹¹.

1 Marine Insurance Act 1906 s 33(3).

2 See eg *Printpak (a firm) v AGF Insurance Ltd* [1999] 1 All ER (Comm) 466, [1999] Lloyd's Rep IR 542, CA.

3 A breach of warranty may be waived by the insurer (Marine Insurance Act 1906 s 34(3)), unless it is a warranty of legality (see PARA 264 post). Since the breach of warranty does not give rise to any election by the insurer eg to choose to keep the contract on foot, the doctrine of waiver by election has no application. The owners must rely on the doctrine of waiver by estoppel: *Kirkaldy & Sons v Walker* [1999] 1 All ER (Comm) 334, [1999] Lloyd's Rep IR 410; *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd, The Milasan* [2000] 2 Lloyd's Rep 458; *HHH Casualty and General Insurance Co v Axa Corporate Solutions* [2002] EWCA Civ 1253, [2002] 2 All ER (Comm) 1053, [2003] Lloyd's Rep IR 1. As to estoppel see PARA 113 ante; and ESTOPPEL.

4 Marine Insurance Act 1906 s 33(3). The rule applies to a reinsurer unless the policy contains special terms which preclude his questioning the settlement made by the original insurer: see *Fireman's Fund Insurance Co v Western Australian Insurance Co Ltd and Atlantic Insurance Co Ltd* (1927) 33 Com Cas 36; and see also *Australian Widows' Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd* [1914] AC 634, PC (life assurance); and PARA 775 post. See further *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546 (tins to be marked with code for verification of date of manufacture; marks inaccurate or missing); *Simons (t/a Acme Credit Services) v Gale* [1958] 2 All ER 504, [1958] 1 WLR 678, PC (warranted all arrangements made for conversion of vessel at inception of the insurance); *Daneau v Laurent Gendron Ltée (Union Insurance Society of Canton Ltd, third party)* [1964] 1 Lloyd's Rep 220, Ex Ct, Que Adm Dist (warranted that the vessel is to be laid up and out of commission between 16 November and 30 April); *Capital Coastal Shipping Corp'n and Bulk Towing Corp'n v Hartford Fire Insurance Co (United States of America, third party), The Cristie* [1975] 2 Lloyd's Rep 100, Dist Ct, Eastern Dist Virginia (warranted that the master of the insured vessel should be officer named); *Pindos Shipping Corp'n v Raven, The Mata Hari* [1983] 2 Lloyd's Rep 449 (warranty class maintained); *Seavision Investment SA v Evennett and Clarkson Puckle Ltd, The Tiburon* [1990] 2 Lloyd's Rep 418 (warranted that insured vessel 'German FOM', ie flag, ownership and management).

5 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233, [1991] 3 All ER 1, HL. As to the position in non-marine insurance see PARA 94 ante.

6 Marine Insurance Act 1906 s 34(2); *Hibbert v Pigou* (1783) 3 Doug KB 224: cf para 247 text to note 2 post.

7 *Newcastle Fire Insurance Co v Macmorran & Co* (1815) 3 Dow 255, HL, per Lord Eldon (fire policy); *De Hahn v Hartley* (1786) 1 Term Rep 343 (affd (1787) 2 Term Rep 186n, Ex Ch (no reason given)).

8 *Hibbert v Pigou* (1783) 3 Doug KB 224.

9 See PARA 237 post.

10 *Hore v Whitmore* (1778) 2 Cowp 784. *Havelock v Hancill* (1789) 3 Term Rep 277, is not, as has been sometimes supposed, any authority to the contrary: see *Cory v Burr* (1883) 8 App Cas 393 at 401, HL, per Lord Blackburn.

11 See the Marine Insurance Act 1906 s 33(3).

UPDATE

236 Non-compliance with warranty

NOTE 4--See also *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 2 All ER (Comm) 387 (warranted that skipper and another crew member on board at all times).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/A. GENERAL NATURE/237. When non-compliance excused.

237. When non-compliance excused.

Non-compliance with a warranty is excused when:

- 69 (1) by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract; or
- 70 (2) when the compliance with the warranty is rendered unlawful by any subsequent law¹.

1 Marine Insurance Act 1906 s 34(1).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/238. Form of warranty.

B. EXPRESS WARRANTIES

238. Form of warranty.

An express warranty may be in any form of words from which the intention to warrant is to be inferred¹. The word 'warranty' or 'warranted', for instance, is unnecessary. The words 'to sail on such a day', or 'in port', or 'all well' on such a day, etc, if written on the face of the policy, amount to an express warranty as much as any formal clause², and even the description of the vessel insured as being of a certain nation, as a Danish brig or the Swedish ship 'Sophia', will amount to an express warranty of her nationality³. It is sometimes a question, however, especially in time policies⁴ effected with mutual assurance associations⁵, whether a clause which purports to be a warranty should be held to be an exception and not a warranty⁶.

1 Marine Insurance Act 1906 s 35(1). See *F B Walker & Sons Inc v Valentine* [1970] 2 Lloyd's Rep 429, US 5th Cir, where the court found it unnecessary to decide whether a clause had the status of a warranty under Mississippi law because, on the facts, there had been no compliance with the clause. See *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep 161, [2001] Lloyd's Rep IR 596, where it was said that a term will be regarded as a warranty if it relates to the risk and if damages would not be an adequate remedy for the insurers; cf *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] Lloyd's Rep IR 131; *GE Reinsurance Corp v New Hampshire Insurance Co and Willis Ltd* [2003] EWHC 302 (Comm), [2003] All ER (D) 392 (Feb).

2 In *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 AC 281, PC, cited in PARA 290 note 2 post, the words 'Declarations of interest to be made ... as soon as possible after sailing of vessel ...' were held to constitute a warranty.

3 *Kenyon v Berthon* (1778) 1 Doug KB 12n; *Baring v Clagett* (1802) 3 Bos & P 201; *Baring v Christie* (1804) 5 East 398; *Lothian v Henderson* (1803) 3 Bos & P 499, HL; cf *Clapham v Cologan* (1813) 3 Camp 382; *Dent v Smith* (1869) LR 4 QB 414 (no implied warranty against change of nationality). In *Seavision Investment SA v Evennett and Clarkson Puckle Ltd, The Tiburon* [1990] 2 Lloyd's Rep 418, the vessel was expressly 'warranted German FOM' (flag, ownership, management). A strained construction must not, however, be put on a statement in the policy so as to make it a warranty: *Muller v Thompson* (1811) 2 Camp 610. Calling a vessel the 'good ship A' in a time policy is not a warranty of seaworthiness: *Small v Gibson* (1849) 16 QB 141 at 157, Ex Ch; affd sub nom *Gibson v Small* (1853) 4 HL Cas 353.

4 For the meaning of 'time policy' see PARA 222 ante.

5 As to mutual insurance associations see PARAS 517-522 post.

6 See *Colledge v Harty* (1851) 6 Exch 205 (clause held to be a warranty).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/239. Interpretation.

239. Interpretation.

Speaking generally, the same rules of construction apply to the interpretation of a warranty as apply to any other part of the policy. Thus, in order to carry out the parties' presumed intention, a clause 'warranted no iron' has been held to cover steel, and the word 'seamen' has been held to include boys as well as adult mariners¹. In the following paragraphs attention is drawn to the more usual and important navigation warranties².

¹ *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499, CA; *Bean v Stupart* (1778) 1 Doug KB 11. Where a marine policy on a ship contained a warranty that the amount insured on ppi terms should not exceed a certain figure, it was held that the word 'insured' included insurance against war risks: *P Samuel & Co Ltd v Dumas* [1924] AC 431, HL. As to the meaning of 'warranted uninsured' see *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 2 QB 380, CA; and *General Insurance Co of Trieste (Assicurazioni Generali) v Cory* [1897] 1 QB 335; and cf *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd, Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL. See also CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 665-667, 694; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 203. Where a ship is insured 'in any lawful trade', these words must be confined to the trade on which the ship is sent by her owners, and therefore the assured who has sent her on a lawful voyage is not precluded from recovering for a loss occasioned by her being barratrously employed in a smuggling trade: *Havelock v Hancill* (1789) 3 Term Rep 277.

² See PARA 240 et seq post. Many other kinds of warranties are inserted in policies; the forms themselves and the usages affecting them change, and it is of little use to refer to cases in which clauses so variable have been interpreted.

UPDATE

239 Interpretation

NOTE 1--See also *GE Frankona Reinsurance Ltd v CMM Trust No 1400; The Newfoundland Explorer* [2006] EWHC 429 (Admlty), [2006] 1 All ER (Comm) 665 (meaning of 'fully-crewed').

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/240. Warranties as to safety and time of departure.

240. Warranties as to safety and time of departure.

Where the subject matter insured is warranted 'well' or 'in good safety' on a particular day, it is sufficient if it is safe at any time during that day¹. A warranty that the ship was in port on a given day would be construed in the same way².

Where a ship is warranted to sail or depart before or after a given day, the warranty must be exactly complied with, and if she sails or departs, in the former case after, and in the latter case before, the prescribed day, the underwriter is discharged from liability although the loss is not in the remotest degree connected with the time of her sailing or departing. Where a ship is insured 'at and from' an island, the whole island is considered as one starting point, and the ship is not considered as having sailed on her voyage until she has cleared away from the island with the purpose of proceeding directly to the port of destination³.

In order to satisfy a general warranty to sail on or before a given day, the ship need not on or before that day proceed any great distance on her voyage, but must have moved from her moorings on or before that day with the genuine intention of prosecuting the voyage⁴ and not solely for the sake of complying with the warranty⁵. Where a warranty is not merely a general warranty but a warranty to sail or depart from a given port before a given day, it is not enough that she has sailed; she must have left the port before that day⁶.

Where, however, a voyage consists of different stages such as a river and a sea voyage, and the usual course of navigation is to perform them with different crews or equipment, the general warranty to sail on or before a given date only requires the vessel to sail on the earlier stage in the condition in which that part of the voyage is usually performed⁷.

1 Marine Insurance Act 1906 s 38; *Blackhurst v Cockell* (1789) 3 Term Rep 360.

2 As to when a ship is 'in port' see *Hunter v Northern Marine Insurance Co* (1888) 13 App Cas 717, HL ('port' means port in the popular or commercial sense as understood by marine traders); cf para 314 post. As to the meaning of 'port' in relation to an arrived ship see *The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, [1973] 3 WLR 382, HL; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 408.

3 *Veizan v Grant* (1779) Marshall on Marine Insurances (4th Edn) 284; and *Kenyon v Berthon* (1778) 1 Doug KB 12n; *Cruickshank v Janson* (1810) 2 Taunt 301.

4 *Bond v Nutt* (1777) 2 Cowp 601; *Earle v Harris* (1780) 1 Doug KB 357; *Thellusson v Fergusson* (1780) 1 Doug KB 360; *Thellusson v Staples*, *Thellusson v Pigou* (1780) 1 Doug KB 366n; *Cockrane v Fisher* (1835) 1 Cr M & R 809, Ex Ch; cf *Cruickshank v Jason* (1810) 2 Taunt 301; *Sea Insurance Co v Blogg* [1898] 2 QB 398, CA; *Mersey Mutual Underwriting Association Ltd v Poland* (1910) 26 TLR 386.

5 *Ridsdale v Newnham* (1815) 3 M & S 456; *Pittegrew v Pringle* (1832) 3 B & Ad 514; *Graham v Barras* (1834) 5 B & Ad 1011.

6 *Moir v Royal Exchange Assurance Co* (1815) 3 M & S 461; *Lang v Anderdon* (1824) 3 B & C 495 at 500. On an insurance on a ship at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the ship being warranted to sail from Quebec on or before 1 November, the court held that the warranty only applied to the part of the voyage between Quebec and England, and that therefore the underwriters were liable for the loss of the ship between New York and Quebec after 1 November: *Baines v Holland* (1855) 10 Exch 802.

7 *Bouillon v Lupton* (1863) 15 CBNS 113. The decisions in *Ridsdale v Newnham* (1815) 3 M & S 456, and *Pittegrew v Pringle* (1832) 3 B & Ad 514, are scarcely reconcilable with the judgment in *Bouillon v Lupton* supra. For the meaning of the warranties 'not allowed to enter the Gulf of St Lawrence before' a certain date, and 'no

St Lawrence between certain dates' see *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224, and *Birrell v Dryer* (1884) 9 App Cas 345, HL. See also CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 692-694.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/241. Warranty of neutrality.

241. Warranty of neutrality.

There is no implied warranty as to the nationality of a ship or that her nationality is not to be changed during the risk¹, but it often happens in time of war that the assured warrants the ship or goods to be neutral. Such a warranty is called 'a warranty of neutrality'. If the property is enemy property, or ceases to have the character of neutrality because it is employed or dealt with in such a manner as to be liable to capture, the warranty is breached². For instance, if a ship violates the law of blockade or is used in carrying enemy troops or is engaged in the enemy's coasting trade or is carrying contraband goods to the enemy, the ship in the former cases, and the goods in the last case, are not of a neutral character. What is meant by the word 'enemy', whether enemy by birth or by domicile, and in what circumstances property is or becomes enemy property or forfeits its neutral character, are questions sometimes of considerable difficulty appertaining to international and prize law and not to insurance law³.

Again, by the general law of nations, and sometimes under treaties, a ship is bound to carry certain necessary documents to establish her neutrality, and if she makes default in so doing, or if she falsifies or suppresses her papers or uses simulated papers she may render herself liable to capture. In what circumstances she may so render herself liable is also a question belonging to prize or international law⁴.

¹ Marine Insurance Act 1906 s 37; *Clapham v Cologan* (1813) 3 Camp 382; *Dent v Smith* (1869) LR 4 QB 414.

² See text to notes 3-4 infra; and PARA 242 post.

³ See PRIZE; WAR AND ARMED CONFLICT.

⁴ See PRIZE. See also PARA 242 post for the statutory provisions relating to papers establishing neutrality.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/242. Statutory provisions as to warranty of neutrality.

242. Statutory provisions as to warranty of neutrality.

There are two statutory provisions relating to the warranty of neutrality¹ which to a certain extent modify previous decisions. The first of these provisions provides that where insurable property², whether ship³ or goods, is expressly warranted neutral, there is an implied condition that the property is to have a neutral character at the commencement of the risk, and that so far as the assured can control the matter, its neutral character is to be preserved during the risk⁴. Therefore, if the property has not a neutral character at the commencement of the risk, the insurer can avoid the policy⁵; but if the property has lost its neutral character after the commencement of the risk, the insurer's liability depends upon whether this could have been prevented by the assured or his agents. For instance, the underwriter will not be discharged from liability if after the date of the insurance a war has broken out which has made the property enemy property; nor would an insurer of goods be discharged from liability if after the commencement of the risk the ship for the same reason ceased to have a neutral character⁶.

The second of these provisions provides that where a ship is expressly warranted neutral, there is also an implied condition that, so far as the assured can control the matter, she is to be properly documented, that is to say that she is to carry the necessary papers to establish her neutrality, and that she is not to falsify or suppress her papers, or use simulated papers; if any loss occurs through breach of this condition, the insurer may avoid the contract⁷. This provision is applicable only so far as the assured can control the matter, and only to the case of the ship being warranted neutral and the ship's documents not being in order. In such a case the insurer is not liable for any loss occurring through breach of the condition. It seems, however, that he remains liable for any previous loss⁸.

1 See PARA 241 ante.

2 For the meaning of 'insurable property' see PARA 217 ante.

3 'Ship' includes hovercraft: see PARA 217 note 2 ante.

4 Marine Insurance Act 1906 s 36(1).

5 *Woolmer v Muilman* (1763) 1 Wm Bl 427.

6 *Eden v Parkison* (1781) 2 Doug KB 732. The statement in the text does not apply to an outbreak of war between the assured's country and the United Kingdom: see PARA 259 post.

7 Marine Insurance Act 1906 s 36(2).

8 Proper documents are those required by the general law of nations or by treaty, and do not include those which are only required by the ordinances of the belligerent power: *Price v Bell* (1801) 1 East 663; *Bell v Bromfield* (1812) 15 East 364 at 368. As to the want of proper documents where there is no warranty of neutrality see PARA 249 post. As the Marine Insurance Act 1906 s 36 overrides certain previous decisions, eg *Rich v Parker* (1798) 7 Term Rep 705, and as it is clear and precise, it seems useless to refer in detail to the previous cases, and it is sufficient merely to mention the following in addition to those already cited: *Baring v Clagett* (1802) 3 Bos & P 201; *Mayne v Walter* (1782) 3 Doug KB 79; *Barzillai v Lewis* (1782) 3 Doug KB 126; *Garrels v Kensington* (1799) 8 Term Rep 230; *Pollard v Bell* (1800) 8 Term Rep 434; *Bird v Appleton* (1800) 8 Term Rep 562; *Tabbs v Benedelack* (1801) 4 Esp 108; *Siffken v Lee* (1807) 2 Bos & PNR 484; *Barker v Blakes* (1808) 9 East 283; *Le Cheminant v Pearson*, *Le Cheminant v Allnutt* (1812) 4 Taunt 367 at 379.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/243. Warranty against contraband.

243. Warranty against contraband.

If in a policy on goods there is a warranty against contraband, and some of the goods are contraband, the policy is totally void¹.

The carriage of a belligerent's dispatches, or of military or naval personnel in his service, in circumstances which render the ship liable to condemnation is a breach of the warranty of neutrality, but the carriage of naval officers is not a breach of warranty against contraband of war, inasmuch as in legal and commercial language the word 'contraband' is not applied to persons but to goods².

¹ *Seymour v London and Provincial Marine Insurance Co* (1872) 41 LJCP 193.

² *Yangtze Insurance Association v Indemnity Mutual Marine Assurance Co* [1908] 1 KB 911; affd [1908] 2 KB 504, CA. As to the warranty of neutrality see PARAS 241-242 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/B. EXPRESS WARRANTIES/244. Effect of sentence of prize court.

244. Effect of sentence of prize court.

The sentence of a competent prize court¹, either of an enemy or of a neutral country, is, in actions on a marine policy, conclusive as to the existence of the ground on which the court professes to decide. In certain cases, even where the ground on which the sentence must have been based, although not expressed, may be clearly inferred from the whole of the judgment to have been that the property was not neutral, this inference has been held conclusive in an action on the policy².

¹ As to prize courts see PRIZE; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 89.

² *Lothian v Henderson* (1803) 3 Bos & P 499, HL; *Bolton v Gladstone* (1804) 5 East 155 at 160 (affd (1809) 2 Taunt 85). In this respect prize cases are exceptional: *Ballantyne v Mackinnon* [1896] 2 QB 455 at 463, CA; *Hobbs v Henning* (1865) 17 CBNS 791 at 823. See CIVIL PROCEDURE vol 12 (2009) PARA 1192; PRIZE.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/245. Warranty of seaworthiness.

C. IMPLIED WARRANTIES

(A) SEAWORTHINESS

245. Warranty of seaworthiness.

In a voyage policy¹ there is an implied warranty that at the commencement of the voyage the ship² is seaworthy for the purpose of the particular adventure insured³, that is to say that she is reasonably fit in all respects to encounter the ordinary perils of the seas of that adventure⁴.

In a time policy there is no implied warranty of seaworthiness⁵ but the warranty does apply in the case of a 'mixed policy'⁶.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 'Ship' includes hovercraft: see PARA 217 note 2 ante.

3 Marine Insurance Act 1906 s 39(1).

4 Ibid s 39(4). 'Seaworthiness' means the same thing with reference to a policy as it does with reference to a contract of carriage by sea: *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd and Atlantic Insurance Co Ltd* (1927) 138 LT 108, following *Becker, Gray & Co v London Assurance Corp* [1918] AC 101 at 114, HL, per Lord Sumner. As to the meaning of 'seaworthiness' see further PARAS 248-249 post. For its meaning with reference to a contract of carriage see CARRIAGE AND CARRIERS vol 7 (2008) PARA 464 et seq. As to the implied warranty of legality see PARA 257 post. As to the implied condition that the adventure is to be commenced within a reasonable time and must be prosecuted throughout its course with reasonable dispatch see PARA 321 post.

5 Marine Insurance Act 1906 s 39(5); and see PARA 255 post.

6 *M Almojil Establishment v Malayan Motor and General Underwriters (Pte) Ltd, The Al-Jubail IV* [1982] 2 Lloyd's Rep 637, Sing CA. As to mixed policies see PARA 222 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/246. Exclusion of warranty.

246. Exclusion of warranty.

The implied warranty of seaworthiness at the commencement of the voyage¹ may be excluded by express terms or clauses in the policy, if, but only if, these are absolutely inconsistent with that warranty². Thus, where losses from rottenness, inherent defects and other unseaworthiness are excepted, the warranty of seaworthiness at the commencement of the voyage will nevertheless subsist so that if the vessel started with a defective boiler, the underwriter can avoid the policy³.

The implied warranty will be pro tanto neutralised by the clause 'held covered in case of any breach of warranty at a premium to be hereinafter arranged'⁴, and it will be excluded by the clause 'ship allowed to be seaworthy for the voyage'⁵. The implied warranty, like any other warranty⁶, may be waived by the insurer⁷. Waiver is effected either by a clause in the policy to the effect that the underwriters waive any breach of the implied warranty unless the assured or their servants are privy to the unseaworthiness, or by an act of the underwriter such as acceptance of notice of abandonment, affirming the policy after knowledge of the breach of warranty⁸.

1 As to this warranty see PARA 245 ante.

2 Marine Insurance Act 1906 s 35(3); see text and notes infra.

3 *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234; see also *Sleigh v Tyser* [1900] 2 QB 333.

4 *Greenock Steamship Co v Maritime Insurance Co Ltd* [1903] 1 KB 367, where it was held that the additional premium which the underwriters would have been entitled to charge would have at least equalled the loss sustained so that the assured recovered nothing; *Mentz, Decker & Co v Maritime Insurance Co* [1910] 1 KB 132.

5 *Parfitt v Thompson* (1844) 13 M & W 392; *Phillips v Nairne* (1847) 4 CB 343. Where, however, a reinsurance policy on a ship contained a clause to this effect, but there was no such clause in the original policy, it was held that the reinsurer was not liable for the loss because, the ship being unseaworthy, the original insurer was under no liability for the loss: *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd and Atlantic Insurance Co Ltd* (1927) 33 Com Cas 36; and see PARA 775 post. Such a clause may limit the duty to disclose material facts: see *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452, CA ('seaworthiness admitted').

6 Eg a warranty that the amount insured on ppi terms should not exceed a certain figure. See *P Samuel & Co Ltd v Dumas* [1924] AC 431, HL, where it was held (Viscount Finlay and Lord Sumner dissenting) that an underwriter who had himself participated in the excessive insurance was precluded by waiver or acquiescence from relying on the breach of warranty.

7 Marine Insurance Act 1906 s 34(3); and see PARA 236 note 3 ante.

8 *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224 (express warranty). In *Weir v Aberdeen* (1819) 2 B & Ald 320, as explained in *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 at 244, the warranty of seaworthiness was waived by a memorandum on the policy.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/247. Effect of breach of warranty.

247. Effect of breach of warranty.

In the absence of waiver or of some clause affecting its operation, a breach of the implied warranty of seaworthiness¹ will discharge the underwriter from liability as from the time of that breach, even though the loss was wholly unconnected with the unseaworthiness and the unseaworthiness was remedied before the loss occurred².

It does not matter that the unseaworthiness was caused by the acts of third parties or by inevitable accident, or that the assured acted with perfect good faith and did not know, and had no means of knowing, of the ship's unseaworthiness³. If the vessel, in fact, was not seaworthy, the underwriter is not liable. In short, in a voyage policy⁴ the seaworthiness of the ship at the commencement of the voyage is, unless the implied warranty is waived by the underwriter or excluded by clear and express terms in the policy, an absolute condition precedent to the underwriter's liability for any loss subsequent to the breach⁵.

1 As to this warranty see PARA 245 ante.

2 See the Marine Insurance Act 1906 s 34(2); *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 at 244, following *Forshaw v Chabert* (1821) 3 Brod & Bing 158. Cf para 236 text to note 6 ante.

3 *The Glenfruin* (1885) 10 PD 103; *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234.

4 For the meaning of 'voyage policy' see PARA 222 ante.

5 *Douglas v Scougall* (1816) 4 Dow 269 at 276, HL, per Lord Eldon LC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/248. Meaning of 'seaworthiness'.

248. Meaning of 'seaworthiness'.

The vessel must be reasonably fit¹. 'Seaworthiness' is a relative term, and may vary with the class of the ship insured. Thus, a river steamer insured for a sea voyage need not be made as fit for the voyage as an ocean-going vessel. She need only be made as seaworthy as is reasonably practicable by ordinary available means².

Moreover, the standard of seaworthiness varies with the nature of the voyage insured; the vessel may be seaworthy for one voyage but not for another, or for a voyage at one season of the year and not for a voyage at another season; she may be seaworthy when laden with one kind of cargo and not so when laden with another kind³.

1 Cf the Marine Insurance Act 1906 s 39(1), (2), (4); and PARA 251 post.

2 *Burges v Wickham* (1863) 3 B & S 669; *Clapham v Langton* (1864) 34 LJB 46, Ex Ch; *Harocopos v Mountain* (1934) 49 Ll L Rep 267; and *Neue Fischmehl Vertriebsgesellschaft Haselhorst mbH v Yorkshire Insurance Co Ltd* (1934) 50 Ll L Rep 151 at 154 per MacKinnon J. The underwriter may, however, be entitled to avoid the policy if the fact of the ship being only a river steamer is material to the risk and has not been disclosed to him. See also *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452, CA, where the subject matter insured was a floating dock; and PARA 246 note 5 ante.

3 The ship should be in a condition to encounter whatever perils of the seas a ship of that kind and laden in that way may be fairly expected to encounter on the voyage insured: *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at 77, HL, per Lord Cairns LC; *Daniels v Harris* (1874) LR 10 CP 1 (ship laden with deck cargo); *Stanton v Richardson*, *Richardson v Stanton* (1874) LR 9 CP 390, Ex Ch (affd (1875) 45 LJCP 78, HL) (cargo of wet sugar).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/249. Respects in which vessel must be seaworthy.

249. Respects in which vessel must be seaworthy.

The ship must be reasonably fit in all respects¹. She must be competent in hull to encounter the ordinary perils of the seas and properly equipped with the necessary tackle, stores, supplies, provisions, medicines and other things requisite for the safety of the voyage and those on board her, and she must have her engines and boilers in sound and proper condition, and also an adequate supply of fuel for the voyage².

However, a temporary defect in the ship's condition, due to some negligence at the time of sailing, does not constitute a breach of the implied warranty of seaworthiness, provided that the state of the ship is such that, if the master and crew do their duty, the defect can be remedied or any danger from it averted. Thus, a ship is not unseaworthy on account of a port-hole being improperly left open at the commencement of the voyage if it can be readily closed at sea whenever necessary³.

The vessel must also at the commencement of the voyage be properly manned with a competent master and a competent and adequate crew, and must have a pilot on board at the port of departure in cases where there is an establishment of pilots at that port and the nature of the navigation requires one⁴.

A ship may be seaworthy even if not properly documented at the commencement of the voyage. Lack of proper documentation will, however, discharge an insurer from liability if the insurance is on the ship and condemnation arose on that ground⁵.

1 For the meaning of this requirement see *CARRIAGE AND CARRIERS* vol 7 (2008) PARA 464 et seq, where the subject is more fully discussed with reference to contracts for carriage by sea, but, as stated in PARA 245 note 4 ante, 'seaworthiness' means the same thing with reference to that contract as it does with reference to the contract of marine insurance.

2 A defective boiler and deficient ground tackle make the ship unseaworthy: see *Wedderburn v Bell* (1807) 1 Camp 1 (sails); *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 (boiler); *Wilkie v Geddes* (1815) 3 Dow 57, HL (anchors). See also *Woolf v Claggett* (1800) 3 Esp 257 (medicines, etc); *Thin v Richards & Co* [1892] 2 QB 141, CA (insufficient coal); *Greenock Steamship Co v Maritime Insurance Co Ltd* [1903] 1 KB 367 (coal).

3 *Steel v State Line Steamship Co* (1877) 3 App Cas 72, HL; *Hedley v Pinkney & Sons Steamship Co* [1892] 1 QB 58, CA; *Gilroy, Sons & Co v Price & Co* [1893] AC 56, HL, where the defect was not capable of easy remedy, and unseaworthiness was found.

4 *Tait v Levi* (1811) 14 East 481; *Shore v Bentall* (circa 1828) 7 B & C 798n; *Phillips v Headlam* (1831) 2 B & Ad 380 at 383 per Parke J. The master must be in reasonably good health, but there is no warranty that his state of health is perfect: *Rio Tinto Co Ltd v Seed Shipping Co* (1926) 134 LT 764. If the owners fail to tell the master of the special precautions requisite owing to the peculiar construction of the ship, the master's ignorance of this information may constitute unseaworthiness: *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, HL. It seems clear that sailing without a pilot from a port where pilotage is compulsory, or with an uncertificated master or mate or engineer contrary to statute, cannot make the voyage illegal and the policy void on that ground. As to illegal insurance see PARA 258 post.

5 *Dawson v Atty* (1806) 7 East 367, as explained in *Bell v Carstairs* (1811) 14 East 374 at 393 per Lord Ellenborough CJ; *Carruthers v Gray* (1811) 3 Camp 142; *Carruthers v Gray* (1812) 15 East 35; *Hobbs v Henning* (1865) 17 CBNS 791. These decisions may be rested either on an implied condition, in case of insurance against capture, that the ship is to be properly documented, or on the principle that the want of proper documents was the proximate cause of loss: *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114 at 128, CA, per Collins LJ; and see *Price v Bell* (1801) 1 East 663 at 673 per Lawrence J. As to the warranty of neutrality see PARAS 241-242 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/250. No continuing warranty of seaworthiness.

250. No continuing warranty of seaworthiness.

There is no warranty or condition that a ship originally seaworthy¹ for the voyage insured shall continue to be seaworthy, or that the master and crew shall do their duty during the voyage. Therefore, the negligence and misconduct of master and crew after the voyage has commenced is no defence to an action on the policy where the loss has been immediately occasioned by the perils insured against². Even when the policy is on a voyage out and home, the risk being entire and indivisible, it is sufficient if the ship is seaworthy for the entire voyage when she first sails from the home port of loading³.

¹ For the meaning of 'seaworthiness' see PARAS 248-249 ante.

² *Dixon v Sadler* (1839) 5 M & W 405 at 414-415 per curiam (affd sub nom *Sadler v Dixon* (1841) 8 M & W 895, Ex Ch); *Bermon v Woodbridge* (1781) 2 Doug KB 781 at 788 per Lord Mansfield CJ; *Eden v Parkison* (1781) 2 Doug KB 732 at 735; *Watson v Clark* (1813) 1 Dow 336 at 344, HL, per Lord Eldon LC; *Busk v Royal Exchange Assurance Co* (1818) 2 B & Ald 73; *Biccard v Shepherd* (1861) 14 Moo PCC 471. For cases where negligence was the remote cause of loss see also *Walker v Maitland* (1821) 5 B & Ald 171; *Bishop v Pentland* (1827) 7 B & C 219; *Holdsworth v Wise* (1828) 7 B & C 794; *Shore v Bentall* (circa 1828) 7 B & C 798n; *Phillips v Headlam* (1831) 2 B & Ad 380; *Redman v Wilson* (1845) 14 M & W 476; *Dudgeon v Pembroke* (1877) 2 App Cas 284 at 296, HL. There is no express provision in the Marine Insurance Act 1906 that the ship must be seaworthy only at the commencement of the voyage, but it is clear from the enactments it contains (see s 39(5); and PARA 255 post) relating to different stages of the voyage that it does not alter the law as established by the cases cited supra.

³ *Bermon v Woodbridge* (1781) 2 Doug KB 781; *Redman v Wilson* (1845) 14 M & W 476.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/251. Doctrine of stages.

251. Doctrine of stages.

There are two exceptions to, or modifications of, the rule that the implied warranty of seaworthiness is not satisfied unless the ship is, at the beginning of the voyage, seaworthy for the whole of that voyage¹.

The first exception or modification is that, where the policy attaches while the ship is in port, there is an implied warranty that the ship is at the commencement of the risk to be reasonably fit to encounter the ordinary perils of the port², that is to say she must be capable of being moved from one part of the port to another for the purpose of repairs, and of being moored alongside the wharves and quays there³. If this warranty is satisfied, the policy is in force whilst the ship remains in port, and the insurers are liable for losses occurring during that period; but in order that the policy may continue in force so as to cover the voyage insured she must be seaworthy for that voyage⁴.

The second exception is that, where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of that preparation or equipment for the purposes of that stage⁵. Thus, when a ship is insured 'at and from Lyons to Galati', and sails with a river crew and captain, and without her masts and anchors and other heavy articles, which it is impossible for her to carry on the river voyage, and afterwards takes on board her sea captain and some of her seagoing crew, and is otherwise fitted for the voyage to Galati, the ship will have satisfied the implied warranty of seaworthiness if she was river-worthy when she left Lyons and seaworthy when she sailed from Marseilles⁶.

In such cases as the foregoing, the ship could not at the outset be made reasonably fit for the whole voyage, and, therefore, in order to reconcile the interests of the assured on the one hand and those of the insurers on the other, it is held that the whole voyage must be divided into two stages, and that it is necessary and sufficient for the ship to be seaworthy at the commencement of each of those stages. This principle has been applied where a ship cannot and does not at the commencement of the voyage carry enough fuel for the whole of the insured voyage, and is, therefore, obliged to take in fuel at some further port or ports. In these cases it lies on the shipowner, in order to disprove the defence of unseaworthiness, to show that he was obliged to divide, and had divided, the voyage into stages for fuelling purposes by reason of the necessities of the case, and that at the commencement of each stage the ship had on board sufficient fuel for that stage, in other words, that she was seaworthy for each stage. It further seems that it is a matter for proof as to how the necessities of the case require that voyage to be divided into stages⁷.

1 As to the warranty of seaworthiness see PARA 245 ante.

2 Marine Insurance Act 1906 s 39(2).

3 *Parmeter v Cousins* (1809) 2 Camp 235; *Buchanan & Co v Faber* (1899) 4 Com Cas 223.

4 *Annen v Woodman* (1810) 3 Taunt 299.

5 Marine Insurance Act 1906 s 39(3), which was evidently intended to embody the law laid down in *Bouillon v Lupton* (1863) 15 CBNS 113.

6 *Bouillon v Lupton* (1863) 15 CBNS 113.

7 *The Vortigern* [1899] P 140 at 155, CA, following *Thin v Richards & Co* [1892] 2 QB 141, CA; *Greenock Steamship Co v Maritime Insurance Co Ltd* [1903] 1 KB 367 (affd [1903] 2 KB 657, CA). These decisions do not seem inconsistent with, and are probably covered by, the Marine Insurance Act 1906 s 39(3).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/252. Effect of absence of pilot.

252. Effect of absence of pilot.

A third exception has been suggested to the general rule that an implied warranty of seaworthiness attaches to the ship only at the commencement of a voyage¹. A policy cannot generally be avoided by the master's neglect to take on board a pilot at proper places in the course of the insured voyage, but it has been suggested that perhaps there is a breach of the warranty of seaworthiness if, in a case where the master is required by Act of Parliament to take the services of a pilot, he makes default in so doing, on the ground that the passage over the pilotage district may be considered as a distinctly intermediate voyage².

¹ As to the warranty of seaworthiness see PARA 245 ante.

² This suggestion was made by Patteson J during the argument in *Hollingworth v Brodrick* (1837) 7 Ad & El 40 at 44, explaining *Law v Hollingsworth* (1797) 7 Term Rep 160; see also *Phillips v Headlam* (1831) 2 B & Ad 380 at 382, 384; *Sadler v Dixon* (1841) 8 M & W 895 at 900, Ex Ch, per Tindal CJ; *Gibson v Small* (1853) 4 HL Cas 353 at 398 per Parke B. It is submitted, however, that this suggestion would probably be held inconsistent with more recent cases and with the provisions of the Marine Insurance Act 1906.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/253. Ship's cargoworthiness.

253. Ship's cargoworthiness.

In a voyage policy¹ on goods or other movables² there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy³. Thus, the warranty is not satisfied in a policy on a deck cargo if in ordinary rough weather the goods must be jettisoned, although this could be done without difficulty and the ship could then perform the voyage with safety to herself⁴.

Similarly, if a ship is carrying a cargo of wet sugar and the pumps are not sufficient for the drainage of the cargo and the ordinary leakage of the vessel so that she cannot safely undertake the intended voyage with that cargo on board, the implied warranty is not complied with⁵.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 For the meaning of 'movables' see PARA 217 note 3 ante.

3 Marine Insurance Act 1906 s 40(2).

4 *Daniels v Harris* (1874) LR 10 CP 1; *Sleigh v Tyser* [1900] 2 QB 333 (where cattle were insured against mortality, and the ventilation was insufficient, and it was held that the implied warranty of seaworthiness had not been complied with); and see *Biccard v Shepherd* (1861) 14 Moo PCC 471 (voyage beginning, in respect of separate parcels of goods, at separate times and warranty, therefore, attaching at different times although goods insured under one policy).

5 *Stanton v Richardson, Richardson v Stanton* (1874) LR 9 CP 390, Ex Ch; affd (1875) 45 LJCP 78, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/254. Seaworthiness of cargo.

254. Seaworthiness of cargo.

In a policy on goods or other movables¹ there is no implied warranty that the goods or movables are seaworthy²; nor does the warranty of seaworthiness which is implied as to the ship³ extend to lighters employed to land the cargo⁴.

1 For the meaning of 'movables' see PARA 217 note 3 ante.

2 Marine Insurance Act 1906 s 40(1). This provision is in accordance with the decision in *Koebel v Saunders* (1864) 17 CBNS 71, but, of course, the underwriter is not liable for a loss directly resulting from the inherent defect or vice of the goods. As to this see PARA 353 post.

3 As to the implied warranty of seaworthiness see PARA 245 ante.

4 *Lane v Nixon* (1866) LR 1 CP 412.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/255. Time policy and seaworthiness.

255. Time policy and seaworthiness.

In a time policy¹ there is no implied warranty that the ship is to be seaworthy at any stage of the adventure², but where, with the privity³ of the assured, a ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness⁴. Where a ship is sent to sea in a state of unseaworthiness in more than one respect, and the assured is privy to some, but not all, of the defects, the insurer will be liable unless the assured was privy to the particular defect which caused the loss⁵. Mere omission to take precautions against the ship being unseaworthy does not make the owner privy to any unseaworthiness which that precaution might have disclosed⁶.

1 For the meaning of 'time policy' see PARA 222 ante.

2 Marine Insurance Act 1906 s 39(5). This provision is in accordance with the decisions in *Gibson v Small* (1853) 4 HL Cas 353, and *Dudgeon v Pembroke* (1877) 2 App Cas 284, HL.

3 'With the privity' means with the knowledge and consent: *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49, [1976] 3 All ER 243, CA; applied in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1, [2003] 1 AC 469, [2001] 1 All ER 743, where it was held that the test for the establishment of privity was the subjective one of whether the assured had direct knowledge of the unseaworthiness or an actual state of mind which the law treated as equivalent to such knowledge.

4 Marine Insurance Act 1906 s 39(5); *Thompson v Hopper* (1858) E B & E 1038, Ex Ch; *Dudgeon v Pembroke* (1877) 2 App Cas 284; *Mountain v Whittle* [1921] 1 AC 615 at 618-619, HL, per Lord Birkenhead LC; *Frangos v Sun Insurance Office Ltd* (1934) 49 Ll L Rep 354; *Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd* (1936) 54 Ll L Rep 35; *Ashworth v General Accident Fire and Life Assurance Corp Ltd* [1955] IR 268; *The Pacific Queen* [1963] 2 Lloyd's Rep 201, US 9th Cir; *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49, [1976] 3 All ER 243, CA. See further PARA 353 post. The insurer is not liable if the unseaworthiness was a proximate cause, although not the sole cause, of the loss: *M Thomas & Son Shipping Co Ltd v London and Provincial Marine and General Insurance Co Ltd* (1914) 30 TLR 595, CA. The insurer is not liable if the assured was privy to the state of things which rendered the vessel unseaworthy, even though he may not have formed the opinion that she was unseaworthy: *M Thomas & Son Shipping Co Ltd v London and Provincial Marine and General Insurance Co Ltd* supra.

5 *Thomas v Tyne and Wear Steamship Freight Insurance Association* [1917] 1 KB 938.

6 *Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd* (1936) 54 Ll L Rep 35 at 58 per Branson J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(A) Seaworthiness/256. Burden of proof of unseaworthiness.

256. Burden of proof of unseaworthiness.

Unseaworthiness¹ is a question of fact, the burden of proof of which is on the insurer². Where, however, a ship soon after sailing founders or becomes disabled, and this cannot be ascribed to any violent storm or other adequate cause, there is a presumption of fact that it arose from unseaworthiness at the commencement of the voyage, and the burden of proof is then shifted to the assured³.

1 For the meaning of 'seaworthiness' see generally paras 248-249 ante.

2 See eg *Pickup v Thames and Mersey Marine Insurance Co* (1878) 3 QBD 594, CA. As to the burden of proof see further CIVIL PROCEDURE vol 11 (2009) PARA 769 et seq.

3 *Parker v Potts* (1815) 3 Dow 23, HL; *Davidson v Burnand* (1868) LR 4 CP 117; *Pickup v Thames and Mersey Marine Insurance Co* (1878) 3 QBD 594, CA; *Compania Naviera Vascongada v British and Foreign Marine Insurance Co Ltd* (1936) 54 Ll L Rep 35 at 51 per Branson J; *Ajum Goolam Hossen & Co v Union Marine Insurance Co, Hajee Cassim Joosub v Ajum Goolam Hossen & Co* [1901] AC 362, PC, approving *Anderson v Morice* (1874) LR 10 CP 58 at 68 (affd on this point (1875) LR 10 CP 609, Ex Ch; (1876) 1 App Cas 713, HL, without reasons given). See also *Watson v Clark* (1813) 1 Dow 336, HL; *Douglas v Scougall* (1816) 4 Dow 269, HL; *The Tatjana* [1911] AC 194; *R Silcock & Sons Ltd v Maritime Lighterage Co (J R Francis & Co) Ltd* (1937) 57 Ll L Rep 78, CA. It has been observed by Brett LJ in *Pickup v Thames and Mersey Marine Insurance Co* supra at 601, that the judgments of Lord Eldon LC, in the cases in Dow's Reports, were on appeal from Scots judgments where the courts were judges of fact as well as law, and that, therefore, the presumptions referred to in those judgments were presumptions of fact and not of law (see also at 605 per Thesiger LJ).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/257. Warranty of legality.

(B) LEGALITY

257. Warranty of legality.

There is an implied warranty¹ that the adventure insured is a lawful one, and that so far as the assured can control the matter, the adventure² is to be carried out in a lawful manner³.

1 As to the nature of warranties in marine insurance contracts see generally para 235 ante.

2 This provision has no application to non-marine insurance in respect of goods alone: *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA; and see PARA 183 ante.

3 Marine Insurance Act 1906 s 41. See *The Pacific Queen* [1963] 2 Lloyd's Rep 201, US 9th Cir (where the court declined to express a view as to whether the violation of the Tanker Act (46 US Code s 391a) rendered the voyage illegal); *James Yachts Ltd v Thames and Mersey Marine Insurance Co Ltd* [1977] 1 Lloyd's Rep 206, BC SC (assured carrying on boat building business when forbidden to do so by local authority byelaws and regulations); *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, [1997] 2 All ER 929, CA (insurer not able to rely on the implied warranty where the unlawful agreement was not part of the insured adventure). As to contracts of insurance tainted with illegality see *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA; and PARA 183 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/258. Illegal insurance generally.

258. Illegal insurance generally.

An insurance on an illegal voyage or adventure is itself illegal for, if an original transaction is illegal, a contract intended to indemnify against loss in respect of that adventure must evidently also be illegal¹. A contract of marine insurance² may be illegal by the common law or by statute, or because the insured adventure is illegal; and the adventure may be illegal either by statute, or because it is in violation of the common law or the prize law as administered in England, or in contravention of treaties made by the United Kingdom government with other countries, or of proclamations or orders made by the Queen in Council³.

1 *Redmond v Smith* (1844) 7 Man & G 457 at 474 per Tindal CJ. See also the Marine Insurance Act 1906 s 3(1); and PARAS 217, 257 ante.

2 For the meaning of 'contract of marine insurance' see PARA 216 ante.

3 As to treaties see *The Eenrom* (1799) 2 Ch Rob 1 at 6; *Bird v Appleton* (1800) 8 Term Rep 562 at 564; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 801-802; INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 71 et seq. As to statute law see *Wilson v Marryat* (1798) 8 Term Rep 31 (affd sub nom *Marryat v Wilson* (1799) 1 Bos & P 430, Ex Ch). As to illegal contracts generally see CONTRACT vol 9(1) (Reissue) PARAS 836-838. As to proclamations see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 916-918.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/259. Insurances by or on behalf of enemy aliens.

259. Insurances by or on behalf of enemy aliens.

Contracts of marine insurance, like other contracts, if entered into with a British subject by or on behalf of an enemy alien¹ during a war with the United Kingdom are wholly void and illegal, and cannot be enforced by the assured or his agent².

On the other hand, insurances, if effected before the outbreak of war by persons who afterwards become enemy aliens, are valid and legal contracts, the right of action on which is only suspended during the war and revives upon its close³; but although those insurances are legal contracts, they are, on grounds of public policy, not allowed to cover any losses that occur during the war, and are available only as contracts of indemnity against losses which have occurred before the commencement of hostilities⁴.

The fact, however, that war is expected and imminent will not free the insurer from liability for loss of property by seizure, even if it is seized by a government for the purposes of a war which it is on the point of declaring, and even though the insurance was intended to protect the property against that seizure⁵.

As a general rule, whenever any property, according to prize law⁶ as administered by the courts of this country, is liable to British capture, the insurance in England on that property is illegal and void. It may be liable to British capture on many various grounds, for example because it is enemy property, or contraband carried to a hostile country, or because the ship is employed in violation of a blockade by the United Kingdom government or its allies, or is engaged in carrying the enemy's troops, or in any other manner which is considered by English prize law to be illicit or illegal⁷.

1 A person is an enemy alien if he voluntarily resides or carries on business in an enemy country: see the Trading with the Enemy Act 1939 s 2(1) (as amended); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 576-581.

2 *The Hoop* (1799) 1 Ch Rob 196 at 198, 201; *Furtado v Rogers* (1802) 3 Bos & P 191 at 199-200; *Esposito v Bowden* (1857) 7 E & B 763; and see *Kellner v Le Mesurier* (1803) 4 East 396; *Gamba v Le Mesurier* (1803) 4 East 407; *Brandon v Curling* (1803) 4 East 410; *De Luneville v Phillips* (1806) 2 Bos & PNR 97. These propositions are not affected by the Hague Regulations 1907 (Cd 4175), art 23(h), contained in the International Convention concerning the Laws and Customs of War on Land (Hague Convention IV) (The Hague, 18 October 1907; TS 9 (1910); Cd 5030); *Porter v Freudenberg* [1915] 1 KB 857, CA.

3 *Furtado v Rogers* (1802) 3 Bos & P 191 at 201; *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, HL; *Harman v Kingston* (1811) 3 Camp 150; *Flindt v Waters* (1812) 15 East 260; and see *Boulton v Dobree* (1808) 2 Camp 163; *Shepheler v Durant* (1854) 14 CB 582. An enemy alien underwriter may be sued during the war, at any rate if the loss occurred before he became an enemy alien. He may defend the action but may not counterclaim: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 574.

4 *Brandon v Curling* (1803) 4 East 410 at 417 per Lord Ellenborough CJ; *Gamba v Le Mesurier* (1803) 4 East 407; *Kellner v Le Mesurier* (1803) 4 East 396 (loss by British capture); *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 493, 499, 508, HL. In the last case the question incidentally arose whether the action on the policy could be brought during the war where the defendant raised no objection; Vaughan Williams LJ (in the Court of Appeal: see [1901] 2 KB 419 at 433), and Lord Davey (see [1902] AC 484 at 499) stated in their opinion it could not, but in this opinion Lord Lindley (see [1902] AC 484 at 509) did not concur. The point was not expressly decided in *Porter v Freudenberg* [1915] 1 KB 857, CA, but the court appears to have taken the same view as Vaughan Williams LJ and Lord Davey. See also *Harman v Kingston* (1811) 3 Camp 150; *Flindt v Waters* (1812) 15 East 260; *Alcinous v Nigreu* (1854) 4 E & B 217; *Shepheler v Durant* (1854) 14 CB 582.

5 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491 et seq, HL, per Lord Halsbury LC, and at 506 per Lord Lindley.

6 As to prize law see PRIZE.

7 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 499, HL, per Lord Davey. It is important to notice that the rules relating to the transfer of property during or in contemplation of war differ materially in many respects from those which govern the rights of parties in peace (see PRIZE; WAR AND ARMED CONFLICT).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/260. Policy on adventure contravening foreign law.

260. Policy on adventure contravening foreign law.

A contract for the performance of an adventure which involves contravention of the laws of a foreign and friendly state may be unenforceable under English law¹. However, unless the adventure is illegal under English law, an insurance on it will, it seems, be enforceable, although the fact of contravention may be a material circumstance to be disclosed to the insurer².

1 See *Regazzoni v K C Sethia (1944) Ltd* [1957] 3 All ER 286, HL. As to foreign laws which the English courts will not recognise, and as to the enforcement of contracts contravening the laws of foreign states, see further CONFLICT OF LAWS; and consider *Planché v Fletcher* (1779) 1 Doug KB 251.

2 As to non-disclosure and circumstances material to be disclosed see PARA 390 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/261. Insurance on neutral adventure.

261. Insurance on neutral adventure.

Neutrals, whether British subjects or foreigners, are by English law entitled to carry on their trade with a belligerent, subject to the belligerent's right of capture; hence it follows that the carriage of contraband goods, and voyages in breach of blockade, are not illegal, and that insurances on those goods or voyages are valid¹.

¹ *Re Grazebrook, ex p Chavasse* (1865) 34 LJBCy 17; *The Helen* (1865) LR 1 A & E 1; *Caine v Palace Steam Shipping Co* [1907] 1 KB 670 at 679, CA, per Farwell LJ. *Harratt v Wise* (1829) 9 B & C 712, and *Naylor v Taylor* (1829) 9 B & C 718, although assumed to be so in *Medeiros v Hill* (1832) 8 Bing 231 at 234, are not authorities to the contrary: see *The Helen* supra at 7; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 408. Where, however, the rights of neutrals to trade with the enemy have been modified or abrogated by Act of Parliament or Order in Council, an insurance on an adventure disallowed by that Act or Order would doubtless be illegal; cf para 262 note 5 post. As to the power of the Crown to make Orders in Council see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 907.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/262. Insurance where acts illegal by United Kingdom law are involved.

262. Insurance where acts illegal by United Kingdom law are involved.

A policy may be illegal because the insured adventure contravenes the law relating to revenue or navigation or any other law of the United Kingdom; and whether a statute renders a voyage illegal, or is only intended to impose a penalty on the owner, master or other person violating it, is a question of construction¹.

Where the adventure which is the subject of the insurance is not in itself unlawful, the fact that in the course of the insured voyage United Kingdom law relating to revenue or navigation is contravened does not make the insurance illegal unless the insured himself was a party to the illegality or could control the matter involving the illegality²; and an authority from the owner to the master of the ship to do an illegal act will not be implied from the master's general powers³. Thus, if the master of a vessel, which has not obtained a certificate required by the statute to carry passengers, carries them without her owner's knowledge, the policy effected by the owner is not vitiated on the ground of illegality⁴.

Moreover, although it was the parties' intention at the time of entering into the contract that it should be carried out in a manner which is in fact prohibited by law, if both parties were ignorant of the prohibition, and if the contract can be and is ultimately carried out without violating the law, the contract is not void⁵.

1 *Atkinson v Abbott* (1809) 11 East 135 at 141 per Lord Ellenborough CJ; *Redmond v Smith* (1844) 2 Dow & L 280; and see *Smith v Mawhood* (1845) 14 M & W 452; *Cunard v Hyde* (1859) 2 E & E 1.

2 Cf the Marine Insurance Act 1906 s 41 (see PARA 257 ante); *Farmer v Legg* (1797) 7 Term Rep 186; *Cunard v Hyde* (1859) 2 E & E 1.

3 *Dudgeon v Pembroke* (1874) LR 9 QB 581 (affd (1877) 2 App Cas 284, HL (but no appeal on this point)); *Carstairs v Allnutt* (1813) 3 Camp 497; *Metcalfe v Parry* (1814) 4 Camp 123; *Cunard v Hyde* (1858) EB & E 670; *Hobbs v Henning* (1865) 17 CBNS 791 at 821; *Wilson v Rankin* (1865) LR 1 QB 162.

4 *Dudgeon v Pembroke* (1874) LR 9 QB 581; *Australasian Insurance Co v Jackson* (1875) 33 LT 286, PC (breach of the Pacific Islanders Protection Act 1872 (repealed)). As to these and other necessary certificates see SHIPPING AND MARITIME LAW.

5 *Waugh v Morris* (1873) LR 8 QB 202; contrast *Foster v Driscoll* [1929] 1 KB 470, CA. If the adventure insured was lawful by English law when the contract of insurance was effected, but subsequently becomes unlawful by reason of an 'act of state' of the United Kingdom government, and is therefore abandoned, the abandonment may give rise to a loss recoverable from the underwriter: see *Sanday & Co v British and Foreign Marine Insurance Co Ltd* [1915] 2 KB 781, CA (affd sub nom *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL); and see PARA 337 note 6 post. If, however, an assured persists in an adventure, and the subject matter insured is consequently seized by the United Kingdom authorities, the assured cannot recover: *Sanday & Co v British and Foreign Marine Insurance Co Ltd* supra at 788 per Bailhache J; see also the Marine Insurance Act 1906 s 41; and PARA 257 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/263. Effect of illegality of part of insured voyage.

263. Effect of illegality of part of insured voyage.

Difficult questions have arisen as to whether the illegality of part of a voyage renders the insurance of other parts illegal. The result of the cases, so far as they can be reconciled with each other, seems to be:

- 71 (1) that any illegality in the prior stages, or at the outset, of an integral voyage vitiates a policy, even though the policy is effected only to protect some later stage in which there is no illegality;
- 72 (2) that an illegality in any part of an entire risk or voyage insured vitiates the insurance as to the whole of it;
- 73 (3) that the illegality of a wholly distinct and separate voyage has no effect on the voyage insured by the policy¹.

Whether the voyage insured is to be considered a distinct and separate voyage or only part of a larger voyage is a question depending mainly on the contract of affreightment and the circumstances in which it was made².

¹ *Wilson v Marryat* (1798) 8 Term Rep 31 at 46 per Lord Kenyon CJ (affd sub nom *Marryat v Wilson* (1799) 1 Bos & P 430, Ex Ch, but without touching this point); *Bird v Pigou* (1800), cited in 2 Selwyn's NP (13th Edn) 932; *Bird v Appleton* (1800) 8 Term Rep 562; *Sewell v Royal Exchange Assurance Co* (1813) 4 Taunt 856.

² See the cases cited in note 1 supra. Some of those decisions are difficult to reconcile with each other and some seem inconsistent with the Marine Insurance Act 1906 s 41 (see PARA 257 ante). It is submitted that in these circumstances the English courts are likely to follow the canon of construction which applies to a codifying statute in common with other instruments, and to give effect to the natural meaning of the enactment: see PARA 15 ante; and STATUTES. If this view is correct, the question whether there has been a breach of the warranty of legality will generally be determined by only two considerations, namely: (1) whether the adventure insured is a lawful one; and (2) whether, so far as the assured was in a position to control the matter, the adventure has been carried out in a lawful manner. As to non-waiver of illegality see PARA 264 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(iv) Warranties/C. IMPLIED WARRANTIES/(B) Legality/264. No waiver of implied warranty of legality.

264. No waiver of implied warranty of legality.

If a policy is illegal in the sense that it or the adventure insured violates a rule of public policy¹, its illegality cannot be waived by either party, nor can either party contract out of the rule, and the court is bound to declare the policy void as soon as the illegality is disclosed².

¹ See *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587 at 595, PC.

² *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 469, HL, per Lord Haldane LC; and see *Gedge v Royal Exchange Assurance Corp* [1900] 2 QB 214 at 220 (ppi policy), cited in PARA 386 note 11 post. It may be worth noticing that 'warranty' in the Marine Insurance Act 1906 s 41 (see PARA 257 ante) seems to be used in a somewhat inaccurate manner, for although an implied warranty can be waived, the illegality of a policy cannot be waived by either party.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(v) Alteration and Rectification of Policy/265. Effect of alterations.

(v) Alteration and Rectification of Policy

265. Effect of alterations.

A policy of marine insurance, like any other contract, may be altered by consent, even after it is underwritten, provided that the alteration is in writing signed or initialled by the insurer¹. An alteration by one insurer, however, cannot bind any of the other insurers, and any material alteration of the policy, when in the possession of the assured or his agent, avoids the policy, except as to the insurers who had consented to it by signing or initialling the alteration². On the other hand, an alteration, if not material, will not vitiate the policy, the only result being that if some of the insurers have consented to the alteration after the policy is executed and others refuse, those who consent make the altered instrument their own, and those who do not consent remain liable on their original contract³.

1 *Kaines v Knightly* (1682) Skin 54; *Robinson v Tobin* (1816) 1 Stark 336.

2 *Laird v Robertson* (1791) 4 Bro Parl Cas 488; *Langhorn v Cologan* (1812) 4 Taunt 330; *Campbell v Christie* (1817) 2 Stark 64; *Fairlie v Christie* (1817) 7 Taunt 416; *Forshaw v Chabert* (1821) 3 Brod & Bing 158; *Norwich Union Fire Insurance Society v Colonial Mutual Fire Insurance Co Ltd* [1922] 2 KB 461.

3 *Sanderson v Symonds* (1819) 1 Brod & Bing 426; *Sanderson v M'Cullom* (1819) 4 Moore CP 5; *Forshaw v Chabert* (1821) 3 Brod & Bing 158 at 165.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(v) Alteration and Rectification of Policy/266. What alterations are material.

266. What alterations are material.

An alteration is material which in any degree affects the contract or any rights or remedies under it, as, for instance, where the destination of the vessel insured is altered at the time of her sailing or the subject of the insurance is altered¹, or the agreed value of the subject matter is altered². An alteration or addition is not material which merely expresses what the law could otherwise imply as to the effect or construction of the instrument³.

1 *Laird v Robertson* (1791) 4 Bro Parl Cas 488; *Langhorn v Cologan* (1812) 4 Taunt 330; *Fairlie v Christie* (1817) 7 Taunt 416; *Campbell v Christie* (1817) 2 Stark 64; *Forshaw v Chabert* (1821) 3 Brod & Bing 158.

2 *Norwich Union Fire Insurance Society v Colonial Mutual Fire Insurance Co Ltd* [1922] 2 KB 461.

3 *Clapham v Cologan* (1813) 3 Camp 382; and see the cases cited in PARA 265 note 3 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(2) INSURANCE POLICIES/(v) Alteration and Rectification of Policy/267. Rectification of policies.

267. Rectification of policies.

Where a mistake has been made in drawing up a contract, and its terms do not correctly express the real agreement between the parties, the court has jurisdiction to rectify the instrument so as to make it correspond with the parties' true intention¹. The Marine Insurance Act 1906 provides that where there is a policy², reference may be made to the 'slip' or covering note in any legal proceeding³, and the court has power to rectify a policy so as to make it correspond with the terms expressed in the 'slip' or covering note⁴.

1 *Motteux v Governor & Co of London Assurance* (1739) 1 Atk 545; *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317. The remedy of rectification, and the defences available, are discussed in EQUITY; MISTAKE vol 77 (2010) PARA 57 et seq.

2 The Marine Insurance Act 1906 s 89 refers to a 'duly stamped policy', but a policy of insurance is now exempt from all stamp duties (see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1002). A contract of marine insurance is inadmissible in evidence unless embodied in a policy: see PARA 220 ante.

3 Marine Insurance Act 1906 s 89.

4 *The Aikshaw* (1893) 9 TLR 605; *Spalding v Crocker* (1897) 2 Com Cas 189; *Allom v Property Insurance Co* (1911) Times, Finance, Commerce and Shipping section, 10 February (fire insurance); *Emanuel & Co v Andrew Weir & Co* (1914) 30 TLR 518; *Lowland Steamship Co v North of England Protecting and Indemnity Association* (1921) 6 Ll L Rep 230; *Gagnière & Co Ltd v Eastern Co of Warehouses Insurance and Transport of Goods with Advances Ltd* (1921) 8 Ll L Rep 365, CA; *Maignen & Co v National Benefit Assurance Co Ltd* (1922) 38 TLR 257; *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67 at 83; *Wilson, Holgate & Co Ltd v Lancashire and Cheshire Insurance Corp Ltd* (1922) 13 Ll L Rep 486; *Scottish Metropolitan Assurance Co v Stewart* (1923) 15 Ll L Rep 55; *Eagle Star and British Dominions Insurance Co Ltd v A V Reiner* (1927) 27 Ll L Rep 173; *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 34 Com Cas 23 (affd 34 Com Cas 233, CA); *American Employers Insurance Co v St Paul Fire and Marine Insurance Co Ltd* [1978] 1 Lloyd's Rep 417; *Pindos Shipping Corp v Raven, The Mata Hari* [1983] 2 Lloyd's Rep 449; *Kiriacoulis Lines SA v Compagnie D'Assurances Maritime Aeriennes et Terrestres (CAMAT), The Demetra K* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep 581, [2002] Lloyd's Rep IR 795.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/268. Insurance brokers.

(3) THE COURSE OF BUSINESS OF INSURANCE

268. Insurance brokers.

A marine policy is generally effected by an insurance broker, who acts as middleman between the assured and the insurers. The broker's business consists mainly in receiving instructions from the assured as to the nature of the risk and the rate of premium at which the insurance is to be effected¹, communicating these facts to the insurers and effecting the policy on the best possible terms for the assured, paying the premium to the insurers, and receiving from them whatever may be due from them under the policy in case of loss. In these matters the broker is the agent of the assured and not the agent of the insurers².

¹ Where an insurance is effected 'at a premium to be arranged', and no arrangement is made, a reasonable premium is payable: Marine Insurance Act 1906 s 31(1). What is a reasonable premium is a question of fact: s 88. As to insurance brokers see further PARA 69 ante.

² *Empress Assurance Corpn Ltd v C T Bowring & Co Ltd* (1905) 11 Com Cas 107. For an application to marine insurance business of the principle of the law of agency that a dishonest agent forfeits his right to his contractual remuneration as well as being obliged to pay over to his principal any commission improperly received from a third party see *E Green & Son Ltd v G Tughan & Co* (1913) 30 TLR 64. See further AGENCY vol 1 (2008) PARAS 93, 94.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/269. Course of business.

269. Course of business.

Briefly stated, the course of the business of marine insurance as carried on in London and elsewhere in the United Kingdom is as follows. A broker on receiving orders from his principal to effect an insurance prepares what is usually known as a 'slip', containing rough notes sufficient to indicate the terms of the proposed insurance. The broker then takes the slip round to the various underwriters, who may be Lloyd's underwriters or underwriters on behalf of insurance companies. Those underwriters who are willing to accept the risk signify their willingness by initialling the slip for the amounts for which they are willing to become insurers. So far as the initials on the slip are those of Lloyd's underwriters a policy is prepared by the broker and submitted by him to Lloyd's Policy Signing Office¹. Insurance companies, however, prepare their own policies, and in order to enable them to do so the broker sends to each company a memorandum of the engagement which the particular company has already entered into by initialling the slip².

¹ See PARA 24 note 8 ante.

² This memorandum is often called the 'long slip'. The original slip submitted by the broker to the company's underwriter is often called the 'short slip': see *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67. For a more detailed statement of this course of business see Arnould on Marine Insurance (16th Edn) s 163. Sometimes insurance brokers guarantee the solvency of the underwriters. In such cases they are said to act *del credere*, or to be *del credere* agents (as to which see AGENCY vol 1 (2008) PARA 13), and receive therefor a commission *del credere*. This commission is earned by entering into the contract of guarantee, and does not at all depend upon the subsequent events: *Caruthers v Graham* (1811) 14 East 578; *Couturier v Hastie* (1852) 8 Exch 40; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/270. The 'slip'.

270. The 'slip'.

In practice, and according to the understanding of those engaged in marine insurance, the insurance slip is the complete and final contract fixing the terms of the insurance and the premium, and, without the assent of the other, neither party can deviate from the terms agreed on without a breach of good faith¹. In accordance with this practice it is provided that a contract of marine insurance² is deemed to be concluded when the assured's proposal is accepted by the insurer, whether the policy is then issued or not³, and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract⁴.

By initialling a slip the insurer impliedly agrees to issue a policy in accordance with the slip, but this agreement, although binding in honour, is unenforceable in law, because a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy⁵.

1 *Ionides v Pacific Insurance Co* (1871) LR 6 QB 674 at 684 (affd (1872) LR 7 QB 517, Ex Ch) (where it was held that, a stamped policy being in existence, the slip might be looked at for the purpose, amongst other things, of ascertaining the parties' intention in preparing the policy); *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 97 LJB 646, CA; contrast *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67, where the 'long slip' differed from the 'short slip', and it was held that the policy had been rightly made out in accordance with the 'long slip' and could not be rectified. As to the 'long slip' and the 'short slip' see PARA 269 note 2 ante. As to rectification see PARA 267 ante.

2 For the meaning of 'contract of marine insurance' see PARA 216 ante.

3 In practice it is not unusual for a policy to be issued after a loss has occurred.

4 Marine Insurance Act 1906 s 21 (amended by the Finance Act 1959 s 37(5), Sch 8 Pt II). This was also the previous law: *Cory v Patton* (1872) LR 7 QB 304; *Cory v Patton* (1874) LR 9 QB 577 (any fresh fact coming to the assured's knowledge after the initialling of the slip, but before the execution of the policy itself, need not be communicated to the insurers); applied in *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179, Ex Ch. The Marine Insurance Act 1906 s 89 provides that 'reference may be made, as heretofore, to the slip or covering note in any legal proceeding': see *Ionides v Pacific Insurance Co* (1871) LR 6 QB 674 at 678. The slip is admissible as an aid to the interpretation of the policy: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep 161, [2001] Lloyd's Rep IR 596, doubting *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, CA. As to the construction of marine policies see PARA 226 et seq ante.

5 Marine Insurance Act 1906 s 22: see PARA 220 ante. The policy may be executed and issued either at the time the contract is concluded or afterwards: s 22.

UPDATE

270 The 'slip'

NOTE 1--See *Allianz Insurance Co Egypt v Aigaion Insurance Co SA* [2008] EWCA Civ 1455, [2009] Lloyd's Rep IR 533, [2008] All ER (D) 234 (Dec).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/271. Payment of premiums.

271. Payment of premiums.

Unless otherwise agreed, the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the policy to the assured or his agent are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium¹.

Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses or in respect of returnable premium².

Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, that acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker³.

It follows from the above provisions that, as a general rule, the assured is liable to the broker for premiums as money paid on his behalf, whether or not they have been paid over by the broker to the insurer⁴.

1 Marine Insurance Act 1906 s 52. It is not easy to ascertain what effect this provision was intended to have. It seems that it cannot have any application to a policy effected at Lloyd's with individual underwriters, as, even if they can be considered as issuing a policy, it is, in fact, underwritten without any such tender or payment, nor can it apply to any insurance, whether by companies or at Lloyd's, in those cases in which the premium is paid or deemed to have been paid on or before effecting the policy.

2 Ibid s 53(1); see *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326.

3 Marine Insurance Act 1906 s 54. Sections 53(1), 54, embodied the law laid down in previously decided cases: see *Power v Butcher* (1829) 10 B & C 329 at 340, 347; *Dalzell v Mair* (1808) 1 Camp 532; *De Gaminde v Pigou* (1812) 4 Taunt 246; *Airy v Bland* (1774) 2 Park's Marine Insurances (8th Edn) 811; *Xenos v Wickham* (1863) 14 CBNS 435 at 456-457, Ex Ch, per Blackburn J (and on appeal (1866) LR 2 HL 296 at 319 per Lord Chelmsford LC); see also *Lamone, Nisbett & Co v Hamilton* 1907 SC 628; *Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 2 QB 93, CA. In the last case the policy, which was effected by a company, did not contain an acknowledgment of the receipt of the premium, and contained a promise by the assured to pay it. It is doubtful, however, whether the decision is not impliedly overruled by the Marine Insurance Act 1906 s 53(1). See also *Roberts v Security Co Ltd* [1897] 1 QB 111, CA, and the comments on this case in *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] AC 96, PC.

4 See also *Bain Clarkson v Owners of Sea Friends* [1991] 2 Lloyd's Rep 322, CA, where the failure to pay premiums did not entitle the brokers to arrest the ship.

UPDATE

271 Payment of premiums

NOTE 2--See *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] EWCA Civ 792, [2005] 1 All ER 225.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/272. Set-off of premiums and losses.

272. Set-off of premiums and losses.

A claim under a policy, whether the loss is total or partial, is a claim for unliquidated damages¹, so that losses and premiums could not be set off against each other under the statutes of set-off²; nor are they now the subject of set-off but, in proceedings brought by the insurer against him for premiums, the broker can counterclaim, at any rate to the extent to which he could recover on the policies for his own use and benefit³.

Where the broker or the insurer becomes bankrupt, there can be no counterclaim in proceedings brought by either of them against the other, inasmuch as no claim can be maintained against the trustee of a bankrupt's estate for a debt due from the bankrupt⁴. Although no counterclaim in the ordinary sense of the word can be maintained, there may, however, be a right of set-off under the mutual credit clause of the Insolvency Act 1986⁵, and the rules in respect of setting off losses under that clause are as stated below.

- 74 (1) Where bankruptcy of the underwriter has intervened, and the action is brought by the trustee of the bankrupt's estate, the broker who has effected the policy in his own name and on his own account, or in his own name but on account of his principal, provided in this last case he has also a lien on the policy to the extent of his set-off⁶, may set off losses allowed to him in account by the underwriter before his bankruptcy, even though unadjusted; those losses being mutual credits within the meaning of those words in the Insolvency Act 1986⁷.
- 75 (2) Where, however, the broker effects the policy both in the name and on account of his principal, or where, when effected in his own name but on the principal's account, he has no lien on it, or where he effects it in his own name, but expressly on the face of the policy as agent, he has no such right of set-off. He has no such right even though he acts under a *del credere* commission, for such a commission, being a contract wholly between the broker and the assured, cannot affect the mutual rights and liabilities of the broker and the underwriter, and, therefore, does not by itself entitle the broker to his right of set-off⁸.

1 *Castelli v Boddington* (1852) 1 E & B 66; *Luckie v Bushby* (1853) 13 B & C 864; *Thomson v Redman* (1843) 11 M & W 487; *Pellas v Neptune Marine Insurance Co* (1879) 5 CPD 34, CA; and see *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw* [1907] 1 KB 116 at 123; *Baker v Adam* (1910) 15 Com Cas 227. Summary judgment may be given in an action on a policy against default in payment of a sum of money: see *Dane v Mortgage Insurance Corp'n Ltd* [1894] 1 QB 54, CA.

2 2 Geo 2 c 22 (1728); 8 Geo 2 c 24 (1734) (both repealed by the Statute Law Revision and Civil Procedure Act 1883 s 4). As to the nature of the modern right of set-off see generally CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq.

3 *Young v Kitchin* (1878) 3 Ex D 127; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC.

4 As to the effect of a bankruptcy order see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 490 et seq.

5 See the Insolvency Act 1986 s 323; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 547-559.

6 *Davies v Wilkinson* (1828) 4 Bing 573. As to lien on the policy see PARAS 274-275 post.

7 See the Insolvency Act 1986 s 323; and *Grove v Dubois* (1786) 1 Term Rep 112 (as explained by Lord Ellenborough CJ in *Parker v Smith* (1812) 16 East 382 at 386); *Koster v Eason* (1813) 2 M & S 112; *Parker v Beasley* (1814) 2 M & S 423.

8 *Wilson v Creighton* (1782) 3 Doug KB 132; *Cumming v Forester* (1813) 1 M & S 494; *Koster v Eason* (1813) 2 M & S 112; *Parker v Beasley* (1814) 2 M & S 423; *Davies v Wilkinson* (1828) 4 Bing 573; *Lee v Bullen* (1858) 8 E & B 692n; *Baker v Langhorn* (1816) 4 Camp 396 (subsequent proceedings on an application for a new trial, 6 Taunt 519); *Peele v Northcote* (1817) 7 Taunt 478. These rules are the result of the cases cited in this note and notes 6-7 supra. As to brokers in the capacity of 'del credere' agents see PARA 269 note 2 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/273. Return of premium.

273. Return of premium.

The amount of premium ultimately payable to the insurer may frequently depend on contingencies which cannot at once be ascertained, as for instance where it is agreed that the premium should be reduced if the ship should sail on or before a specified day, or in case of short interest. In these cases there is a returnable premium, and, unless otherwise agreed, where a marine policy is effected on the assured's behalf by a broker, the insurer is directly responsible to the assured in respect of returnable premium¹.

¹ Marine Insurance Act 1906 s 53(1); see PARA 271 ante. As to the return of premiums see further PARAS 501-510 post. Returns of premium are dealt with as losses. The insurer is credited with the initial premium, and if a return is afterwards found to be due it is adjusted on the policy and credited to the broker, just as a loss would be adjusted or credited.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/274. Insurance agent's lien on the policy.

274. Insurance agent's lien on the policy.

When it is effected, the policy becomes the property of the assured, who may maintain a claim for its recovery subject to any lien which the broker may have for premiums and commissions or for the general balance of his insurance account¹.

Where the policy is left by the assured in the broker's hands, unless otherwise agreed, the broker has, as against the assured, a lien on the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from that person, unless when the debt was incurred he had reason to believe that that person was only an agent².

A person who, although not an insurance broker, is the agent in England of a merchant abroad has a lien on the policy, which he is authorised to effect, for the general balance due to him or becoming due on his account with his principal while the policy remains in his hands³ or in those of an insurance broker employed by him⁴.

The general lien of an insurance broker or agent is, however, confined to the balance of the insurance account, and does not extend to transactions between the broker and the assured on a distinct account having no relation to insurance, but, where bankruptcy intervenes, money becoming due under those transactions may be the subject of set-off under the mutual credit clause of the Insolvency Act 1986⁵.

If an insurance broker, having a lien on a policy, is summoned to produce it under a witness summons to produce documents in proceedings by the assured against the insurer, he can be compelled to produce the policy, but, if the assured is successful in the claim, the court will prevent the money from being paid over to him until the broker's lien is satisfied⁶.

1 *Harding v Carter* (1781) 1 Park's Marine Insurances (8th Edn) 4 per Lord Mansfield CJ. The broker is entitled to commission if he is causally linked to the placing of the risk: *Harding Maughan Hambly Ltd v Compagnie Européenne de Courtage D'Assurances et De Reassurances SA* [2000] Lloyd's Rep IR 293.

2 Marine Insurance Act 1906 s 53(2). As regards the previous law see *Fisher v Smith* (1878) 4 App Cas 1, HL. 'Lien' in the Marine Insurance Act 1906 s 53(2) means the right to retain physical possession of the policy until the debt is discharged: *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199, [1998] 1 All ER 946, CA. See *Fairfield Shipbuilding and Engineering Co Ltd v Gardiner, Mountain & Co Ltd* (1911) 27 TLR 281 (broker estopped as against real principal from setting up general lien; question whether lien on policies extended to proceeds collected thereunder left open). The affirmative proposition in the statutory provision cited embodies the law laid down in *Man v Shiffner* (1802) 2 East 523; *Olive v Smith* (1813) 5 Taunt 56; *Westwood v Bell* (1815) 4 Camp 349 at 353; *Mann v Forrester* (1814) 4 Camp 60; *Godin v London Assurance Co* (1758) 1 Burr 489 at 493. For the qualification in the statutory provision see *Maanss v Henderson* (1801) 1 East 335; *Man v Shiffner* supra; *Snook v Davidson* (1809) 2 Camp 218; *Lanyon v Blanchard* (1811) 2 Camp 597, as explained in *Westwood v Bell* supra; *Cahill v Dawson* (1857) 3 CBNS 106; *Maspons y Hermano v Mildred* (1882) 9 QBD 530 at 543, CA (affd sub nom *Mildred, Goyeneche & Co v Maspons* (1883) 8 App Cas 874, HL). The Marine Insurance Act 1906 s 53(2) does not apply to composite insurance ie where one assured places insurance both on his own behalf and on behalf of other interests: *Eide UK Ltd v Lowndes Lambert Group Ltd* supra.

3 See *Godin v London Assurance Co* (1758) 1 Burr 489.

4 *Man v Shiffner* (1802) 2 East 523.

5 See the Insolvency Act 1986 s 323; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 547-559. See also *Olive v Smith* (1813) 5 Taunt 56; *Rose v Hart* (1818) 2 Moore CP 547; and PARA 272 ante.

6 *Hunter v Leathley* (1830) 10 B & C 858; 2 Duer on Marine Insurance 294, 297. As to a witness summons to produce documents see CIVIL PROCEDURE vol 11 (2009) PARAS 1004-1006.

UPDATE

274 Insurance agent's lien on the policy

NOTE 2--A broker who has a lien over the policy has a commensurate right to retain claims proceeds collected under it in so far as necessary to satisfy the debt secured by the lien: *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2006] EWHC 1345 (Comm), [2006] 2 All ER (Comm) 543.

NOTE 7--See *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 All ER (Comm) 501.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/275. Extinction of lien.

275. Extinction of lien.

The lien of an insurance broker or agent, like the lien of every agent, is extinguished when he voluntarily delivers up the policy to his principal or by his order, even by mistake, or if he parts with the policy wrongfully as by pledging it as his own, but not if it is taken from him by force or fraud¹. If, after it has been parted with, it comes again into the broker's possession, his particular lien revives. His general lien will also revive unless at the time of regaining possession he knew or had reason to believe that the person who employed him was only an agent².

¹ *Levy v Barnard* (1818) 8 Taunt 149 at 155. See AGENCY vol 1 (2008) PARA 117; LIEN vol 68 (2008) PARA 854.

² *Levy v Barnard* (1818) 8 Taunt 149; *Near East Relief v King, Chasseur & Co Ltd* [1930] 2 KB 40 per Wright J, approving 2 Duer on Marine Insurance 290, 359-360; and see LIEN vol 68 (2008) PARA 854.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/276. Settlement of losses.

276. Settlement of losses.

The assured generally leaves the policy with the broker, or hands it to him in order that he may settle the amount of loss¹ with the insurer and obtain payment from him; and it seems that in that case the broker has ostensible authority to settle the loss and receive payment of the money².

In the absence of an express or implied agreement to the contrary, the broker has only authority to receive payment of losses in cash, and has no authority to bind the assured by a mere settlement of the loss in account between him and the insurer³. In the case, however, of Lloyd's underwriters, the claims for losses fall due seven days after they have been settled, and it is customary to carry on current accounts between the broker and the underwriters, setting off losses against premium and passing cheques for the balance due at the end of each quarter; but, as this usage is not a general one and only prevails at Lloyd's, the assured, unless proved to be cognisant of it and to have assented to it, can recover the loss against the underwriter, even if the claim has, between broker and insurer, been settled and passed into account⁴.

On the other hand, if the assured is proved to have been apprised of the usage and to have assented to it, he is bound by it and cannot recover from the insurer claims so settled and passed into account⁵. In this case, however, the broker, having deprived the assured of all rights remaining against the insurer, will be liable to the assured for the amount as money had and received to his use, and, in proceedings by the assured, will be estopped from saying that he has not that money in his hands for the plaintiff's use⁶.

When the broker has been expressly instructed to effect the insurance at Lloyd's, this fact may justify the inference that the assured has consented to be bound by the usage⁷.

1 As to the insurer's responsibility to the assured for the amount payable in respect of losses see the text and notes infra.

2 *Xenos v Wickham* (1863) 14 CBNS 435 at 464, Ex Ch, per Blackburn J, a minority judgment which was supported on appeal (1866) LR 2 HL 296; *Sweeting v Pearce* (1859) 7 CBNS 449 (affd (1861) 9 CBNS 534, Ex Ch); *Scott v Irving* (1830) 1 B & Ad 605; *Legge v Byas, Mosley & Co* (1901) 7 Com Cas 16. As to payment by bill see *Hine Bros v Steamship Insurance Syndicate Ltd* (1895) 72 LT 79, CA.

3 *Jell v Pratt* (1817) 2 Stark 67; *Todd v Reid* (1821) 4 B & Ald 210; *Russell v Bangley* (1821) 4 B & Ald 395; *Bartlett v Pentland* (1830) 10 B & C 760, and the cases cited in note 2 supra; and see *Matveieff & Co v Crossfield* (1903) 8 Com Cas 120 (where it was held that *Sweeting v Pearce* (1859) 7 CBNS 449 (affd (1861) 9 CBNS 534, Ex Ch) was not overruled by *Robinson v Mollett* (1875) LR 7 HL 802). See also *Re Law Car and General Insurance Corp Ltd* (1911) 55 Sol Jo 407 (affd [1911] WN 101, CA) (agreement for payment of premiums into joint account and deduction of losses therefrom).

4 See note 3 supra; and *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901.

5 *Stewart v Aberdeen* (1838) 4 M & W 211; see the cases cited in note 3 supra; cf *Macfarlane v Giannacopulo* (1858) 3 H & N 860 at 866. See also the Marine Insurance Act 1906 s 87(1). As to the binding effect of usages see PARA 232 ante. This usage does not extend to dealings between brokers and insurance companies: *Hine Bros v Steamship Insurance Syndicate Ltd* (1895) 72 LT 79, CA.

6 *Andrew v Robinson* (1812) 3 Camp 199; *Wilkinson v Clay* (1815) 6 Taunt 110. As to estoppel by representation generally see ESTOPPEL.

7 *Bartlett v Pentland* (1830) 10 B & C 760 at 770; *Stewart v Aberdein* (1838) 4 M & W 211; *Sweeting v Pearce* (1861) 9 CBNS 534 at 541, Ex Ch. See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 673.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(3) THE COURSE OF BUSINESS OF INSURANCE/277. Recovery of payments for losses and premiums.

277. Recovery of payments for losses and premiums.

Where an underwriter has, by mistake, paid a loss to the broker to which the assured is not entitled, he may recover it back from the broker if the latter has not paid it over to his principal, or settled in account with him in such manner as amounts to payment¹. Merely passing it into account is not for this purpose equivalent to payment².

A premium paid in respect of an illegal insurance is not, in general, recoverable, although the insurer cannot be compelled to pay the loss³.

It seems that an agent, to whom money has actually been paid to the use of a principal, cannot withhold it from him on the ground that the transaction out of which the payment arose was illegal. Therefore, where a loss has actually been paid over by the insurer to the broker, the broker cannot, in a claim for money had and received to the use of the assured, set up as a defence the illegality of the insurance⁴. Where, however, the money has not been paid but only allowed in account, premiums on illegal insurances may be stopped by the assured while in the broker's hands, and the insurer cannot recover them from the broker⁵. Moreover, the insurance agent cannot dispute the title of his principal, and, after receiving money for him in that capacity, cannot set up that he did not so receive it, but only received it for the benefit of some other person⁶.

1 *Buller v Harrison* (1777) 2 Cowp 565; *Holland v Russell* (1861) 1 B & S 424 (affd (1863) 4 B & S 14). The broker cannot claim a lien for unpaid premiums due from the assured as the money is not his principal's money: see *Scottish Metropolitan Assurance Co Ltd v P Samuel & Co Ltd* [1923] 1 KB 348.

2 *Buller v Harrison* (1777) 2 Cowp 565.

3 *Lowry v Bourdieu* (1780) 2 Doug KB 468; *Allkins v Jupe* (1877) 2 CPD 375. For the full treatment of this subject see PARAS 501-510 post.

4 *Farmer v Russell* (1798) 1 Bos & P 296; *De Mattos v Benjamin* (1894) 63 LJQB 248; *O' Sullivan v Thomas* [1895] 1 QB 698, DC; *Burge v Ashley and Smith Ltd* [1900] 1 QB 744, CA.

5 *Edgar v Fowler* (1803) 3 East 222.

6 *Roberts v Ogilby* (1821) 9 Price 269; *Dixon v Hamond* (1819) 2 B & Ald 310. If *Bell v Jutting* (1817) 1 Moore CP 155 is inconsistent with these two cases, it must be considered to be overruled by them. See also *Dixon v Hovill* (1828) 4 Bing 665. The rules of the common law relating to principal and agent apply to the case of the assured and broker: Marine Insurance Act 1906 s 91(2). As to these rules generally see AGENCY vol 1 (2008) PARAS 95, 96.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/278. Authority to insure.

(4) INSURANCE AGENTS

278. Authority to insure.

A person may have express or implied authority to insure on another's behalf, but, unless he has that authority, he cannot recover the premium from the other person¹.

¹ *French v Backhouse* (1771) 5 Burr 2727; and see PARA 279 text to note 1 post. As to ratification see PARA 388 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/279. Authority of particular classes of person.

279. Authority of particular classes of person.

A partner has implied authority from other members of the firm to procure an insurance to be effected for them and himself on partnership property¹, but this rule does not apply to part owners² unless they are jointly interested in the particular adventure insured in such a manner as to be partners in it³.

A consignor or commission agent to whom funds are remitted for the purpose of purchasing and shipping goods for his employer has not, merely as consignor, an implied authority to insure the goods on his principal's behalf, but that authority can be inferred from the established course of dealing between the two parties or by the usage of a particular trade⁴.

As regards the consignee, he has not, merely as consignee, implied authority to insure on the consignor's behalf, and cannot, therefore, charge him with the premiums⁵; but where he has an interest exceeding that of a mere consignee, for example where he has made advances on the goods consigned to him, he acquires authority to insure them, and can effect a policy to the amount of the insurable value, and then, by alleging the interest in himself and his consignor, he can recover the whole amount from the insurers⁶.

1 Partnership Act 1890 s 5. As to partnership generally see PARTNERSHIP. As to members of limited liability partnerships as agents see AGENCY vol 1 (2008) PARA 22.

2 *Bell v Humphries* (1818) 2 Stark 346; *Roberts v Ogilby* (1821) 9 Price 269 at 282.

3 *Robinson v Gleadow* (1835) 2 Bing NC 156. In such a case one co-adventurer may have a duty as well as authority to insure: see *Califatis v Olivier* (1919) 36 TLR 18; affd on a different point (1920) 36 TLR 223, CA.

4 2 Duer on Marine Insurance 101-104.

5 2 Duer on Marine Insurance 107-108.

6 Marine Insurance Act 1906 s 14(2); 2 Duer on Marine Insurance 106; *Wolff v Horncastle* (1798) 1 Bos & P 316; *Carruthers v Sheddon* (1815) 6 Taunt 14; *Craufurd v Hunter* (1798) 8 Term Rep 13 at 23; *Ebsworth v Alliance Marine Insurance Co* (1873) LR 8 CP 596. In *Cornwal v Wilson* (1750) 1 Ves Sen 509 at 511, Lord Hardwicke LC expressed an opinion that a merchant who has ordered goods from a foreign correspondent, if he justifiably refuses to receive them and elects to reship, has an implied authority to insure them on the consignor's behalf. It is submitted, however, that this opinion is probably incorrect, as the consignee in that case is not bound to reship, and need only give the consignor notice of his refusal to accept the goods: see the Sale of Goods Act 1979 s 36; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 202. See further PARA 380 post.

UPDATE

279 Authority of particular classes of person

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/280. Revocation of authority.

280. Revocation of authority.

An authority to insure may generally be revoked at any time before a binding contract of insurance has been entered into¹.

¹ It seems, however, extremely doubtful whether a revocation would be effective after an insurance slip or covering note has been signed: see PARA 270 ante. If the authority to insure is given to enable a consignee to secure his advances, that authority may be irrevocable within the principles laid down in *Smart v Sandars* (1848) 5 CB 895 at 917-918: see AGENCY vol 1 (2008) PARA 171.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/281. Obligation to insure.

281. Obligation to insure.

The following rules have been laid down for the determination of the question whether or not a person to whom an order to insure has been transmitted is bound to accept the order, and is liable if he does not duly comply with it:

- 76 (1) where a merchant abroad has effects in the hands of his agent or correspondent in England, he has a right to expect that the agent will comply with an order to insure, because he is entitled to withdraw his money from the other's hands when and in what manner he pleases;
- 77 (2) where the merchant abroad has no effects in the hands of his correspondent in England, but the course of dealing between them has been such that the one has been used to send orders for insurance and the other to execute them, the merchant has a right to expect that his orders for insurance will still be obeyed unless the correspondent gives him notice to discontinue that course of dealing;
- 78 (3) where the merchant abroad sends bills of lading to his correspondent in England with an order to insure as the implied condition on which he is to accept the bills of lading, and the correspondent accepts the bills of lading, he must obey the order, for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition¹.

¹ *Smith v Lascelles* (1788) 2 Term Rep 187 at 188-190 per Buller J; 2 Duer on Marine Insurance 124-125, 127-128. Where goods are sold for shipment, the seller is prima facie obliged to give such notice to the buyer as will enable him to insure them during the sea transit: see the Sale of Goods Act 1979 s 32(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 350, 352. As to carriage by sea see CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq.

UPDATE

281 Obligation to insure

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/282. Obligation to give notice of non-compliance.

282. Obligation to give notice of non-compliance.

Where, under the first or second of the rules previously mentioned¹, the merchant abroad has a right to expect that his order to insure will be complied with, it is the agent's duty, if he does not intend to accept the order, to give prompt notice to the merchant so that the latter may have the opportunity of effecting the insurance elsewhere, and if in consequence of his failure to give due notice no insurance is effected, the agent will be answerable for the loss arising from his default².

1 See PARA 281 ante.

2 *Smith v Lascelles* (1788) 2 Term Rep 187; *Smith v Price* (1862) 2 F & F 748 (measure of damages); cf *Prince v Clark* (1823) 1 B & C 186 at 189; see also *Callander v Oelrichs* (1838) 5 Bing NC 58, and the criticism of that case in 2 Duer on Marine Insurance 222-225.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/283. Insurance broker not agent of insurer.

283. Insurance broker not agent of insurer.

A broker who effects an insurance with an insurer is not his agent, and is under no legal liability to him to use care or skill in effecting the insurance¹.

¹ *Empress Assurance Corpn v C T Bowring & Co* (1905) 11 Com Cas 107; *Glasgow Assurance Corpn Ltd v William Symondson & Co* (1911) 104 LT 254. Where a broker is requested by the insurer to carry out investigations he is under no obligation to comply but may be under a duty of care to the insurer if he does so: *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/284. Liability of insurance agent.

284. Liability of insurance agent.

An insurance agent's liability to his principal is determined by the principles of the law of agency¹.

Thus a person who, voluntarily and without any kind of consideration, promises to procure an insurance is not liable to an action for nonfeasance, because there is no consideration for his promise; but if he in fact enters upon the performance of his undertaking, he is legally bound to use due care and skill². All agents, whether paid or unpaid, skilled or unskilled, are under a legal obligation to exercise due care and skill in performance of the duties which they have undertaken, a greater degree of care being required from a paid than from an unpaid, and from a skilled than from an unskilled, agent³. The question in all these cases is whether the act or omission complained of is inconsistent with that reasonable degree of care and skill which persons of ordinary prudence and ability might be expected to show in the agent's situation and profession⁴.

Every insurance broker is assumed to be skilled in matters relating to insurance and to know the ordinary well-settled rules of insurance law⁵. He will, therefore, be held liable if he fails to communicate to the underwriter the time of the ship's sailing or any other information which may be material⁶. He is further bound to know all the details necessary to make the policy a legally valid instrument⁷, and to insert in the policy the ordinary risks and such customary clauses as are proper in respect of the insured voyage⁸, or the business concerned⁹.

The agent is, of course, bound to obey the express orders of his principal¹⁰, but, if those orders are so ambiguous as to be reasonably susceptible of two distinct meanings and the agent acts in good faith upon one of them, he will, according to the ordinary law of agency, be held justified in so doing and will be exempt from liability¹¹.

1 See AGENCY vol 1 (2008) PARA 74 et seq. As to liability for careless statements apart from contract see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; and AGENCY vol 1 (2008) PARA 135; NEGLIGENCE vol 78 (2010) PARA 13.

2 If a man after taking a trust on himself miscarries in the performance of his trust, an action will lie against him for that, even though nobody could have compelled him to do the things: *Coggs v Bernard* (1703) 2 Ld Raym 909 at 919 per Holt CJ. See also *Wilkinson v Coverdale* (1793) 1 Esp 74, following *Wallace v Tellfair* (1786) 2 Term Rep 188n, where the principle was applied to insurance agency.

3 See AGENCY vol 1 (2008) PARA 78.

4 *Chapman v Walton* (1833) 10 Bing 57 at 63 per Tindal CJ; and see *Hurrell v Bullard* (1863) 3 F & F 445; *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA (broker recommending the insured to insure with company known to be in financial difficulties); *O'Connor v B D B Kirby & Co (a firm)* [1972] 1 QB 90, [1971] 2 All ER 1415, CA (broker filling in proposal wrongly); *Everett v Hogg, Robinson and Gardner Mountain (Insurance) Ltd* [1973] 2 Lloyd's Rep 217 (misrepresentation by broker of material fact made to reinsurers); *Seavision Investment SA v Evennett and Clarkson Puckle Ltd, The Tiburon* [1990] 2 Lloyd's Rep 418 (broker's failure to make proper declaration under open cover); *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No 2)* [1990] 2 Lloyd's Rep 431 (in which the extent of a broker's duties was considered); *Kapur v J W Francis and Co* [2000] Lloyd's Rep IR 361 (obligation to disclose material facts to insurers). It is a question of construction of the terms of the contract of agency whether the agent has contracted merely to use due care and skill to procure an effective insurance or has given an absolute undertaking that he will procure an effective insurance: *Hood v West End Motor Car Packing Co* [1917] 2 KB 38, CA.

5 *Chapman v Walton* (1833) 10 Bing 57 per Tindal CJ.

6 *Maydew v Forrester* (1814) 5 Taunt 615; *Wake v Atty* (1812) 4 Taunt 493; *Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* [1975] 1 Lloyd's Rep 52, NSW SC (failure of brokers to inform insurers of assured's bad claims record); *Warren v Henry Sutton & Co* [1976] 2 Lloyd's Rep 276, CA (failure of broker to inform insurers of assured's friend's poor driving record). See the Marine Insurance Act 1906 ss 19, 20; and PARAS 393, 408-417 post. It is not the broker's duty to forward a contract to the assured as soon as it is issued: *United Mills Agencies Ltd v R E Harvey, Bray & Co* [1952] 1 All ER 225n.

7 *Turpin v Bilton* (1843) 5 Man & G 455; see, however, *Wake v Atty* (1812) 4 Taunt 493.

8 *Mallough v Barber* (1815) 4 Camp 150; *Park v Hammond* (1816) 6 Taunt 495; cf *Comber v Anderson* (1808) 1 Camp 523; *Moore v Mourgue* (1776) 2 Cowp 479.

9 *Fine's Flowers Ltd v General Accident Assurance Co of Canada* (1974) 5 OR (2d) 137 (failure by agent to effect policy relating to horticultural business to give cover for damage to plants by freezing due to failure of water pump).

10 *Yuill & Co v Robson* [1908] 1 KB 270, CA; *Glaser v Cowie* (1813) 1 M & S 52; *Strong and Pearl v S Allison & Co Ltd* (1926) 25 Ll L Rep 504; *Pangood v Barclay Brown* [1999] Lloyd's Rep IR 405 (which discusses the relationship between placing and producing brokers); *First International Commercial Bank plc v Barnet Devanney & Co Ltd* [1999] 2 All ER (Comm) 233, [1999] Lloyd's Rep IR 459, CA; *Bollom v Byas Mosely* [2000] Lloyd's Rep IR 136; *Frost v James Finlay Bank* [2002] EWCA Civ 667, [2002] Lloyd's Rep IR 503. The client is entitled to rely on the broker's carrying out his instructions, and if this is not done and the loss is consequently not recoverable from the insurer, the fact that the client might have discovered the broker's mistake by checking the insurance documents is no defence to an action against the broker for negligence: *Dickson & Co v Devitt* (1916) 86 LJBK 315; *General Accident, Fire and Life Assurance Corp Ltd v J H Minet & Co Ltd* (1942) 74 Ll L Rep 1, CA; *National Insurance and Guarantee Corp plc v Imperio Reinsurance Co (UK) Ltd* [1999] Lloyd's Rep IR 249; *Groupama Insurance Co Ltd v Overseas Partners Re Ltd* [2003] EWHC 34 (Comm), [2003] All ER (D) 226 (Jan).

11 *Fomin v Oswell* (1813) 3 Camp 357; *Ireland v Livingston* (1872) LR 5 HL 395; cf *Yuill & Co v Robson* [1908] 1 KB 270, CA; and see *Moore v Mourgue* (1776) 2 Cowp 479; *Comber v Anderson* (1808) 1 Camp 523; *James Vale & Co v Van Oppen & Co Ltd* (1921) 37 TLR 367. See AGENCY vol 1 (2008) PARA 35.

UPDATE

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NOTE 4--See *HH Casualty and General Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710, [2007] 2 All ER (Comm) 1106 (conflict between interests of insured and insurer did not necessarily exclude broker's duty to insurer).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/285. Evidence of requisite standard of care and skill.

285. Evidence of requisite standard of care and skill.

The question whether an insurance broker has exercised reasonable care and skill is a question of fact¹, but there are two conflicting decisions as to the admissibility of the evidence of persons engaged in the same business as to what would have been in the circumstances the conduct of a broker of reasonable care and skill².

1 *Hurrell v Bullard* (1863) 3 F & F 445.

2 *Campbell v Rickards* (1833) 5 B & Ad 840, where such evidence was held to be inadmissible; *Chapman v Walton* (1833) 10 Bing 57, where it was held admissible. It is submitted that such evidence is admissible. This seems to follow by analogy from the practice in admitting evidence as to what are material facts to be disclosed, and in accordance with the principles laid down by Tindal CJ in *Chapman v Walton* (1833) 10 Bing 57. As to the admission of expert evidence see CIVIL PROCEDURE vol 11 (2009) PARA 835.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/286. Necessity for damage caused by default.

286. Necessity for damage caused by default.

In order to maintain an action against an insurance agent, the principal must not only prove that the agent was in default, but must also establish that he has sustained damage by reason of the default¹. If the assured orders an illegal or void insurance, no claim will lie against the agent for not effecting it or for failure to exercise due care and skill in effecting it², and, if the insurer could have successfully resisted a claim under the policy on the ground of breach of an express or implied warranty, deviation, or the like, the principal cannot recover damages from the agent for not effecting the policy, or for negligence in reference to it, unless perhaps it is clearly shown that the insurer would not have availed himself of any such defence³.

1 *Fraser v B N Furman (Productions) Ltd (Miller Smith & Partners, third parties)* [1967] 3 All ER 57, [1967] 1 WLR 898, CA (decision turned on a condition in the policy); *O & R Jewellers v Terry* [1999] Lloyd's Rep IR 436; *Kennecott Utah Copper Corp v Minet Ltd* [2003] Lloyd's Rep IR 37, [2002] All ER (D) 454 (Jul). The measure of damages for non-insurance is that which would have been recovered from the insurers (*Smith v Price* (1862) 2 F & F 748 at 752 per Erle CJ), but, in accordance with the ordinary principles of agency, an insurance agent may be liable for the costs of previous proceedings which the assured has brought against the insurer if the proceedings were brought with the agent's desire or concurrence (*Maydew v Forrester* (1814) 5 Taunt 615) or if it was reasonable to bring them having regard to the attitude assumed by the agent (*Strong and Pearl v S Allison & Co Ltd* (1926) 25 Ll L 504 at 508). See also *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157 (measure of damages in a reinsurance contract).

2 *Webster v De Tastet* (1797) 7 Term Rep 157; *Glaser v Cowie* (1813) 1 M & S 52; *T Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240, CA.

3 *Delany v Stoddart* (1785) 1 Term Rep 22; 2 Duer on Marine Insurance 325; 2 Phillips' Law of Insurance (5th Edn) s 1904.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/287. Duty in relation to claims.

287. Duty in relation to claims.

If, after being effected, the policy is left in the hands of the insurance agent, it is generally his duty to settle the loss with the insurers, and to collect the various sums due from them and pay them over to his principal, and if he does not use due care and diligence in these matters, he will be responsible to his principal for any loss the principal may sustain by reason of his default¹.

The agent may have express or implied authority, and it may become his duty, to give notice of abandonment in case of a constructive total loss, and in this case he is bound to use reasonable care and diligence, and in default of doing so will become liable to his principal for damage resulting from notice not having been given².

In the absence of his principal's express authority, a broker has no authority to cancel a policy, whether it is left in his hands or not³.

1 *Bousfield v Creswell* (1810) 2 Camp 545; *Grace v Leslie & Godwin Financial Services Ltd* [1995] LRLR 472; and see *Xenos v Wickham* (1863) 14 CBNS 435 at 464-465, Ex Ch, per Blackburn J ('Perhaps it may be put as high as to say that the broker is clothed with authority to do all that is incidentally necessary to carry out the contract in the policy left in his hands; see *Richardson v Anderson* (1805) 1 Camp 43n; *Goodson v Brooke* (1815) 4 Camp 163. I do not wish to be understood as giving a decided opinion that he has so much authority, but there are at least grounds for so contending'); and see PARA 276 ante.

2 *Comber v Anderson* (1808) 1 Camp 523 (sequel to *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38), where a duty to give notice was not established.

3 *Xenos v Wickham* (1866) LR 2 HL 296, revsg (but not on this point) (1863) 14 CBNS 435, Ex Ch. Where, however, a broker effects a policy in England pursuant to instructions given him in a foreign country, he will have implied authority to cancel that policy if that authority is conferred upon him by the law of the foreign country: *Ruby Steamship Corpn Ltd v Commercial Union Assurance Co Ltd* (1933) 150 LT 30, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(4) INSURANCE AGENTS/288. Agents to subscribe policies.

288. Agents to subscribe policies.

An agent may be appointed not only for the purpose of effecting marine policies for the assured but also for the purpose of subscribing them for the insurers¹.

The authority of the insurer's agent is generally limited by the terms and conditions contained in the agreement by which he is appointed agent; and if it is common knowledge in the place where the policy is effected that agents who subscribe for a principal have only a limited authority, that knowledge must be imputed to the assured, who cannot recover from the principal if the agent has exceeded his actual authority².

On the other hand, if the agent has not exceeded his actual authority, the principal is liable, even if the agent is acting fraudulently for his own benefit and not that of his principal, provided always that the assured has no knowledge of the fraud and is acting in good faith³.

An agent who has authority to subscribe a policy has implied authority, and is also bound, to perform any subsequent act on behalf of his principal that may be rendered necessary by the relation between the principal and the assured such as the authority to sign the adjustment of a loss⁴.

It has already been observed⁵ that Lloyd's agents are not the agents of the underwriters, and have, therefore, no authority to make or sign any adjustment of the loss or accept an abandonment or receive notice of abandonment as the underwriters' representative⁶.

1 *Neal v Erving* (1793) 1 Esp 61; *Mason v Joseph* (1804) 1 Smith KB 406; *Courteen v Touse* (1807) 1 Camp 43; *Haughton v Ewbank* (1814) 4 Camp 88; *Guthrie v Armstrong* (1822) 1 Dow & Ry KB 248; *Brockelbank v Sugrue* (1831) 5 C & P 21; *Mead v Davison* (1835) 3 Ad & El 303.

2 *Baines v Ewing* (1866) LR 1 Exch 320.

3 *Hambro v Burnand* [1904] 2 KB 10, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL: see AGENCY vol 1 (2008) PARA 122. All authority may be continued by estoppel after its expiration: see *Willis, Faber & Co Ltd v Joyce* (1911) 104 LT 576; and ESTOPPEL.

4 *Richardson v Anderson* (1805) 1 Camp 43n.

5 See PARA 24 ante.

6 See *Drake v Marryat* (1823) 1 B & C 473 at 477 per Lord Tenterden CJ; *Vacuum Oil Co v Union Insurance Society of Canton Ltd* (1926) 32 Com Cas 53, CA, per Atkin LJ. As to abandonment and notice of abandonment see PARA 478 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/289. Ship's name.

(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY

289. Ship's name.

As the subject matter must be designated in a marine policy with reasonable certainty, regard, however, being had to any usage regulating the designation¹, the name of the ship in which the insured voyage is to be performed must generally be specified in the policy².

As the insertion of the ship's name is only required for the purpose of identifying her, an error in the name is immaterial if it is shown that the underwriters intended the policy to cover the ship on which the loss actually occurred³. Accordingly, the policy usually contains the clause 'or by whatsoever other name or names the ship may be called'.

¹ See the Marine Insurance Act 1906 s 26(1), (4); and PARA 293 post.

² Where cover is effected by 'Cavalier and/or steamers held covered at premiums to be arranged', this means either (1) that it is open to the assured to leave the ship's name unstated until a loss has taken place or the risk has run off; or (2) that the assured is to declare the name within a reasonable time after ascertaining it: *Marine Insurance Co Ltd v Grimmer* [1944] 2 All ER 197, CA.

³ *Le Mesurier v Vaughan* (1805) 6 East 382; *Clapham v Cologan* (1813) 3 Camp 382 at 383; *Ionides v Pacific Insurance Co* (1871) LR 6 QB 674 (affd (1872) LR 7 QB 517, Ex Ch). The ship's name carries no warranty of nationality: *Clapham v Cologan* supra; *Dent v Smith* (1869) LR 4 QB 414.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/290. Floating policies.

290. Floating policies.

In many cases the assured does not know on what ship or ships the insured goods have been or may be loaded, and he consequently effects what is called a floating policy¹, in which the name of the ship or ships and other particulars are left to be defined by subsequent declaration².

The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner³.

Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. In the case of goods they must comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith⁴.

Unless the policy otherwise provides, where a declaration of value is not made until after loss or arrival the policy must be treated as an unvalued policy⁵ as regards the subject matter of that declaration⁶.

1 As regards the various types of marine insurance policies see generally para 222 ante.

2 See the Marine Insurance Act 1906 s 29(1). Section 29 embodies the law laid down in *Robinson v Touray* (1811) 3 Camp 158; *Harman v Kingston* (1811) 3 Camp 150; *Gledstanes v Royal Exchange Assurance* (1864) 5 B & S 797; *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18. It overrules the decisions in *Kewley v Ryan* (1794) 2 Hy Bl 343; *Henchman v Offley* (1782) 2 Hy Bl 345n; and the corresponding dicta of Blackburn J in *Ionides v Pacific Insurance Co* (1875) LR 6 QB 674 at 682. A policy on specified goods 'per' a named steamer 'and/or steamers' is not a floating policy within the meaning of this provision, and the assured is under no legal obligation to declare the name of the ship on which the goods are in fact shipped: *Dickson & Co Ltd v Devitt* (1916) 86 LJB 315. Where the policy contained a clause to the effect that declarations of interest were to be made as soon as possible after the sailing of the vessel, it was held that this clause was a warranty, failure to comply with which precluded the assured from recovery for a loss, and that the provision in the Marine Insurance Act 1906 s 29(3) (see text and notes 3-4 infra) as to omissions and erroneous declarations was inapplicable: *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 AC 281, PC; see also *Dunlop Bros & Co v Townend* [1919] 2 KB 127; *Glencore International AG v Ryan, The Beursgracht* [2001] EWCA Civ 2051, [2002] 1 Lloyd's Rep 574; *BP plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm), [2003] All ER (D) 390 (Feb).

3 Marine Insurance Act 1906 s 29(2).

4 Ibid s 29(3).

5 As to unvalued policies see PARA 222 ante.

6 Marine Insurance Act 1906 s 29(4).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/291. Cover under a floating policy.

291. Cover under a floating policy.

A floating policy¹ on goods 'on board ship or ships' covers goods loaded at any port within the limits of the insured voyage², but a declaration under a floating policy will not make the policy attach if the declaration is made dishonestly³, or if the floating policy was not intended to cover the interest of the assured in the property which is the subject of the declaration⁴.

1 For the meaning of 'floating policy' see PARA 222 ante.

2 *Hunter v Leathley* (1830) 10 B & C 858.

3 *Rivaz v Gerussi* (1880) 6 QBD 222, CA.

4 *Scott v Globe Marine Insurance Co* (1896) 1 Com Cas 370. Conversely, for the purpose of declarations, the assured cannot exclude from the policy any portion of the interest which it was intended to cover: *Dunlop Bros & Co v Townend* [1919] 2 KB 127.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/292. Transhipment of goods.

292. Transhipment of goods.

It is an implied condition in a marine policy that the ship named in it is not to be changed after the commencement of the risk without necessity or the underwriter's consent. On the other hand, where, by a peril insured against, the voyage is interrupted at an intermediate port or place in such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other movables¹, or in transshipping them and sending them on to their destination, the insurer's liability continues, notwithstanding the landing or transhipment².

1 For the meaning of 'movables' see PARA 217 note 3 ante.

2 Marine Insurance Act 1906 s 59. It is justly stated in Arnould on Marine Insurance (16th Edn) s 281 that the words of this provision imply that where the transhipment is made necessary by a peril not insured against, the insurer's liability does not continue; the provision seems to impose a restriction upon the right to recover on the policy for which, before the Marine Insurance Act 1906, there was no authority. As to the effect of a clause permitting transhipment see PARA 310 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/293. Specification of subject matter.

293. Specification of subject matter.

The subject matter insured must be designated in a marine policy with reasonable certainty¹, but the nature and extent of the assured's interest in the subject matter insured need not be specified in the policy².

Where the policy designates the subject matter insured in general terms, it must be construed to apply to the interest intended by the assured to be covered³.

In the application of the above provisions, regard must be had to any usage regulating the designation of the subject matter insured⁴.

1 Marine Insurance Act 1906 s 26(1).

2 Ibid s 26(2).

3 Ibid s 26(3). 'Interest' in s 26(3) means the assured's interest in the adventure insured: *Dunlop Bros & Co v Townend* [1919] 2 KB 127. When the question was which of two voyages was intended to be reinsured, Sankey J thought that this subsection was inapplicable: *Janson v Poole* (1915) 84 LJB 1543 at 1549. See also *Reliance Marine Insurance Co v Duder* [1913] 1 KB 265, CA.

4 Marine Insurance Act 1906 s 26(4).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/294. Meaning of 'ship'; hovercraft.

294. Meaning of 'ship'; hovercraft.

Unless the context of the policy otherwise requires, the term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers and coals and engine stores, if owned by the assured¹.

The Marine Insurance Act 1906 has effect as if any reference in it in whatever terms to ships, vessels or boats, or activities or places connected with them, included a reference to hovercraft or activities or places connected with hovercraft².

1 Marine Insurance Act 1906 s 30(2), Sch 1 r 15. As to the statutory rules of construction of a marine policy see generally para 226 ante. In whaling voyages 'outfit' includes the fishing stores of the ship employed, that is to say, all the instruments and apparatus necessary for taking the fish and preparing and bringing home the proceeds: *Hill v Patten* (1807) 8 East 373 at 375. Before that case, it was decided in accordance with the general custom of whaling voyages that outfits in this sense of the term were not protected by a general insurance in the ordinary form on the ship's body, tackle, apparel etc, and it would seem this would still continue to be the case (see the Marine Insurance Act 1906 s 26(4); and PARA 293 ante), if that custom still exists (*Hoskins v Pickersgill* (1783) 3 Doug KB 222; *The Dundee* (1823) 1 Hag Adm 109 at 123; *Gale v Laurie* (1826) 5 B & C 156 at 164). Separation cloths and dunnage mats were included in the term 'furniture' in a time policy (see PARA 222 ante) on a ship employed in the Black Sea grain trade: see *Hogarth v Walker* [1900] 2 QB 283, CA. It is submitted that in the absence of any custom the question raised in the cases cited above would now be determined by the application of the Marine Insurance Act 1906 Sch 1 r 15. As to whether a time policy on a ship would cover her bunker coal and stores see *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 1 QB 836; affd [1895] 2 QB 380, CA. Such a policy on 'hull and machinery' does not: *Roddick v Indemnity Mutual Marine Insurance Co* supra. In *New Liverpool Eastham Ferry and Hotel Co Ltd v Ocean Accident and Guarantee Corp'n Ltd* (1929) 35 Com Cas 37, CA, it was held (Russell LJ dissenting, and Scrutton LJ doubting) that the anchors and chains to which a coal hulk was moored were part of tackle and furniture, although when the hulk was temporarily moved these moorings would be left behind. In the collision clause the words 'ship or vessel' are not apt to include a flying boat; see *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] KB 161, [1943] 1 All ER 162.

2 Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1 Pt A. This applies to hovercraft which are used (1) wholly or partly on or over the sea or navigable waters; or (2) on or over land to which the public have access or non-navigable waters to which the public have access; or (3) elsewhere for the carriage of passengers for reward: art 2. For the meaning of 'hovercraft' see the Hovercraft Act 1968 s 4(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 381.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/295. Meaning of 'goods'.

295. Meaning of 'goods'.

Unless the context of the policy otherwise requires, the term 'goods'¹ means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board; in the absence of any usage to the contrary deck cargo and living animals must be insured specifically and not under the general denomination of goods². The term includes money, bullion or jewels if put on board as merchandise, but does not comprise jewels, ornaments, cash etc, not intended for trade and carried about or belonging to persons on board³, and it probably does not include banknotes or bills of exchange⁴.

A policy on goods will cover successive cargoes on board the same ship in the course of the insured voyage⁵. So, in whaling voyages, the term 'goods' covered the homeward-bound cargo resulting from the fishing adventure such as the oil, whalebone etc, taken in the fishery⁶.

Where the goods insured are actually specified in the policy⁷, it will not attach to any goods which do not answer the description given; for instance, an insurance on 'piece goods' would not cover hats⁸.

1 An insurance on goods covers both loss of goods and loss of the adventure: see PARA 362 post.

2 Marine Insurance Act 1906 s 30(2), Sch 1 r 17. As to the statutory rules of construction of a marine policy see generally para 226 ante. The latter part of the rule, which applies even to goods usually carried on deck, simplifies and to some extent alters the law on this subject as it stood before the Act. On this subject see *Da Costa v Edmunds* (1815) 4 Camp 142; *Apollinaris Co v Nord Deutsche Insurance Co* [1904] 1 KB 252. A usage in the trade in which the goods are carried to carry them on deck is a 'usage to the contrary' within the meaning of this rule (*British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, HL); but a usage of the insurance world to insure deck cargo or living animals under the general designation would also be a 'usage to the contrary' (*British and Foreign Marine Insurance Co Ltd v Gaunt* supra at 54 per Lord Finlay, and at 60 per Lord Sumner). As to usage see generally paras 232-234 ante. See also, as to insurance of deck cargo, *Hood v West End Motor Car Packing Co* [1917] 2 KB 38, CA.

3 *Brown v Stapleton* (1827) 4 Bing 119.

4 *Palmer v Pratt* (1824) 2 Bing 185 at 191-192.

5 *Hill v Patten* (1807) 8 East 373; *Tobin v Harford* (1863) 13 CBNS 791 at 802 (affd (1864) 17 CBNS 528 at 537, Ex Ch).

6 *Hill v Patten* (1807) 8 East 373.

7 See eg *De Symonds v Shedden* (1800) 2 Bos & P 153; *Brown Bros v Fleming* (1902) 7 Com Cas 245.

8 *Hunter v Prinsep* (1806) Marshall on Marine Insurance (4th Edn) 255; cf *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499, CA. This statement was cited with approval in *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546 at 559.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/296. Freight must be specifically insured.

296. Freight must be specifically insured.

Certain interests must be specifically insured, and are not included in the general denomination of goods¹ or ship².

Freight must be specifically insured by appropriate wording in the policy³. This is generally done by inserting the words 'on freight' at the foot or in the margin of the instrument⁴. The term 'freight', when used in a policy to denote the subject matter insured, includes not only money payable to the shipowner for the carriage of goods, but also any benefit derived by him from the employment of the ship such as money paid by the charterer for the hire of the ship, or the benefit derived by the shipowner from the carriage of his own goods⁵.

Passage money, namely money paid by the passenger before sailing, is not, however, covered by a policy on freight unless the terms of the particular policy necessitate a different construction⁶.

1 For the meaning of 'goods' see PARA 295 ante.

2 For the meaning of 'ship' see PARA 294 ante.

3 *Gulf and Southern Steamship Co (Inc) v British Traders Insurance Co Ltd* [1930] 1 KB 451 at 458.

4 See eg *Griffiths v Bramley-Moore* (1878) 4 QBD 70, CA. As to the meaning of an insurance on 'freight chartered and/or as if chartered on board or not on board' see *The Bedouin* [1894] P 1 at 12, CA; *Williams & Co v Canton Insurance Office Ltd* [1901] AC 462, HL; *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51. As to the meaning of 'anticipated freight' see *Papadimitriou v Henderson* [1939] 3 All ER 908 at 915.

5 See the Marine Insurance Act 1906 ss 30(2), 90, Sch 1 r 16, which provide that 'freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money; and see also *Winter v Haldimand* (1831) 2 B & Ad 649; *Forbes v Aspinall* (1811) 13 East 323 at 325 per Lord Ellenborough; *Flint v Flemyng* (1830) 1 B & Ad 45; *Devaux v J'Anson* (1839) 5 Bing NC 519. Where an 'open cover' or slip (see PARA 270 ante) provided that the policy was to cover 'invoice cost plus freight and insurance etc', it was held that 'freight' meant freight which, at the time of the loss, the assured had paid or had become liable to pay, and did not denote freight payable on delivery of the cargo at the port of destination (*Kung v Methuen* (1907) 24 TLR 145, CA); but an insurance of a shipowner's 'charges upon the cargo' will include freight in process of being earned (*Gulf and Southern Steamship Co (Inc) v British Traders Insurance Co Ltd* [1930] 1 KB 451). See also CARRIAGE AND CARRIERS.

6 Marine Insurance Act 1906 s 90, and Sch 1 r 16; *Denoon v Home and Colonial Assurance Co* (1872) LR 7 CP 341. A policy 'on passage money' may be, on its true construction, an insurance against disbursements in respect of particular passage money, in which case the insurers would not be entitled to treat passage money subsequently earned in respect of other passengers as reducing the loss: *New Zealand Shipping Co Ltd v Duke* [1914] 2 KB 682.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/297. Insurance of advance freight.

297. Insurance of advance freight.

The charterer may insure money advanced in part payment of freight¹ if, but only if, the advance is not repayable in case of loss², and he may do so by an insurance on freight, although the more usual course is to insure it specifically as advances on account of or against freight³.

¹ For the meaning of 'freight' see PARA 296 ante.

² Marine Insurance Act 1906 s 12. A loan on account of freight, repayable absolutely, whether or not there is a loss of ship or goods, does not constitute an insurable interest: see *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, HL; and PARA 376 post.

³ *Hall v Janson* (1855) 4 E & B 500; *Wilson v Martin* (1856) 11 Exch 684; *Williams v North China Insurance Co* (1876) 1 CPD 757 at 761, CA; *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, HL; and see *Currie & Co v Bombay Native Insurance Co* (1869) LR 3 PC 72; *Thames and Mersey Marine Insurance Co Ltd v Pitts, Son and King* [1893] 1 QB 476, DC. See further PARA 376 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/298. Insurance of profits.

298. Insurance of profits.

Expected profits, such as the profits which a buyer of goods 'to arrive' would make if the goods arrived safely at the port of destination, are not covered by an insurance on goods, but must be insured specifically as profits¹.

Commissions to arise from the sale of goods are, like profits, an interest in the goods themselves, but such commissions are not covered by an insurance on goods. They must be specifically insured².

¹ A policy on profits with a clause 'beginning the adventure from the loading of the goods' will cover only the profit on goods which are actually shipped (*Royal Exchange Assurance v M'Swiney* (1850) 14 QB 646, Ex Ch; *Halhead v Young* (1856) 6 E & B 312), but a policy may be so framed as to cover profits in respect of goods before they are put on board (*Royal Exchange Assurance v M'Swiney* supra at 660). See also *Wilson v Jones* (1867) LR 2 Exch 139 at 146-147 per Willes J; *Wyllie v Povah* (1907) 12 Com Cas 317.

² *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 314-315, HL; *Anderson v Morice* (1875) LR 10 CP 609 at 624, Ex Ch; *Mackenzie v Whitworth* (1875) 1 Ex D 36 at 43, CA; *Buchanan & Co v Faber* (1899) 4 Com Cas 223 (commission may be covered by a policy on disbursements). As to insurable interest in profits see PARA 371 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/299. Loans on bottomry and respondentia.

299. Loans on bottomry and respondentia.

Loans on bottomry and respondentia¹ give rise to a maritime risk, and may be the subject of insurance by the lenders.

These interests must, however, be specifically described in the policy and cannot be insured under the general designation of ship or goods² unless it is shown to be the usage of any particular trade to insure them under such a general designation³.

1 As to bottomry and respondentia see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 437. See also PARA 382 post.

2 *Glover v Black* (1763) 3 Burr 1394.

3 *Gregory v Christie* (1784) 3 Doug KB 419; Marshall on Marine Insurance (4th Edn) 256.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/300. Disbursements.

300. Disbursements.

A policy on disbursements will cover an advance of freight for the ship's purposes, or an expenditure on fuel, engine-room stores and port charges¹.

¹ *Currie & Co v Bombay Native Insurance Co* (1869) LR 3 PC 72. As to what is covered by a policy on disbursements see further *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 2 QB 380, CA; *Buchanan & Co v Faber* (1899) 4 Com Cas 223; *Lawther v Black* (1901) 6 Com Cas 5 (affd 6 Com Cas 196, CA); *Price v Maritime Insurance Co* [1901] 2 KB 412, CA (on 'advances'); *Moran, Galloway & Co v Uzielli* [1905] 2 KB 555; *New Zealand Shipping Co Ltd v Duke* [1914] 2 KB 682.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(5) SUBJECT MATTER INSURED AND ITS DESCRIPTION IN THE POLICY/301. Specification of interest.

301. Specification of interest.

The nature and extent of the assured's interest in the subject matter insured need not, as a general rule, be specified in the policy unless there is a usage making it necessary¹. Thus, in a contract of reinsurance it is sufficient to designate the subject matter as being ship or goods etc, without describing the contract as one of reinsurance². A policy on goods will cover the interest of carriers on goods so as to protect them against liability to the owner for the loss of the goods³.

¹ Marine Insurance Act 1906 s 26(2), (4); and see PARA 293 ante.

² *Mackenzie v Whitworth* (1875) 1 Ex D 36 at 42, CA; see also *Carruthers v Sheddon* (1815) 6 Taunt 14. As to reinsurance see further PARAS 385, 766-779 post.

³ *Crowley v Cohen* (1832) 3 B & Ad 478. Cf *Joyce v Kennard* (1871) LR 7 QB 78; *Cunard Steamship Co Ltd v Marten* [1903] 2 KB 511, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(6) COMMENCEMENT, DURATION AND AREA OF RISK/(i) Time Policies: Mixed Policies/302. Commencement and duration of risk.

(6) COMMENCEMENT, DURATION AND AREA OF RISK

(i) Time Policies: Mixed Policies

302. Commencement and duration of risk.

In the absence of any stipulation to the contrary, the two limits of time prescribed in a time policy¹ determine the beginning and end of the risk, or, in other words, the insured period. A time policy, however, may be effected retrospectively by the insertion of the ordinary clause 'lost or not lost'²; for instance if a policy is effected on 15 August to commence on the first day of the same month, it will cover any losses occurring on or after 1 August.

A time policy will cover any loss, whether total or partial, occurring³ during the insured period, even though the extent of the loss is only ascertained after the period has expired. For instance, if there is an insurance for six months on a ship which has received fatal damage some days before, but which is kept afloat by pumping until after the expiration of the six months, the insurers would be liable for a total loss⁴.

English time policies usually contain a clause, called the 'continuation clause', which continues the insurance after the expiration of the insured period until the ship arrives at her port of destination⁵.

1 For the meaning of 'time policy' see PARA 222 ante.

2 See PARA 372 post.

3 It is not enough that a pre-existing injury was discovered during the period: *Hutchins Bros v Royal Exchange Assurance Corpn* (1911) 27 TLR 217; affd [1911] 2 KB 398, CA.

4 *Knight v Faith* (1850) 15 QB 649, explaining *Meretony v Dunlope* (1783), referred to by Willes J in *Lockyer v Offley* (1786) 1 Term Rep 252 at 260. Cf *Hough & Co v Head* (1885) 55 LJQB 43, CA.

5 The continuation clause may provide for the continuation of the insurance, on notice being given to the underwriters, if the vessel is at sea or in distress or in a port of call or a port of refuge: see eg Institute Time Clauses (Hulls) cl 2. It may alternatively provide simply that if the ship is at sea at the expiration of the insured period, the insurance is to continue until the ship arrives at some port: *Charlesworth v Faber* (1900) 5 Com Cas 408; *Royal Exchange Assurance Corpn v Sjoforsakrings Akt Vega* [1902] 2 KB 384, CA.

UPDATE

302 Commencement and duration of risk

NOTE 1--See *Glencore International AG v Alpina Insurance Co Ltd (No 2)* [2004] EWHC 66 (Comm), [2004] 1 All ER (Comm) 858 (open policy which did not specify time period construed as providing continuous cover).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(6) COMMENCEMENT, DURATION AND AREA OF RISK/(i) Time Policies: Mixed Policies/303. End of insured period.

303. End of insured period.

Where the insurance is expressed to be from a certain day until another day, the general rule is that the first day is excluded and the last day is included¹. However, the question whether either or both days are covered depends upon the parties' intention to be gathered from the context and the surrounding circumstances. In the absence of an expressed contrary intention, in policies governed by English law time is Greenwich mean time² or summer time when this is in force³; but the enactment of summer time does not affect the use of Greenwich mean time for navigation or the construction of any document mentioning or referring to a point of time in connection with navigation⁴.

1 *Isaacs v Royal Insurance Co Ltd* (1870) LR 5 Exch 296 (fire insurance) where the point decided was that the last day was included, but Kelly CB observed that the authorities illustrated 'the principle that in general the day on which the engagement is entered into is excluded and the last day of the term is included'. In *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA (accident policy), the Queen's Bench Division gave a similar decision which was reversed in the Court of Appeal on another point. In both these cases the insurance was expressed to be for a certain number of months from the first day, so the parties must have intended to exclude one of the two days: see *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* supra at 405 per Day J. In *Johnson & Co Ltd v Bryant* (1896) 1 Com Cas 363, Mathew J decided that the last day was covered; the question whether the first day was included was not discussed. See also *Cartwright v MacCormack* [1963] 1 All ER 11, [1962] 2 Lloyd's Rep 328, CA (motor). Cf *Scottish Metropolitan Assurance Co Ltd v Stewart* (1923) 39 TLR 407, where Rowlatt J held that the reinsurance of a risk on a ship which was expressed to run from a given date included that date. In that case the insurance was 'from 20 September 1922 inclusive', but Rowlatt J did not base his decision on the presence of this word.

2 See the Interpretation Act 1978 ss 9, 23(3), Sch 2 paras 1, 6; and TIME vol 97 (2010) PARA 316.

3 Summer Time Act 1972 s 3(1) (amended by the Summer Time Order 2002, SI 2002/262, art 2(1), (4)). As to the period of summer time see TIME vol 97 (2010) PARAS 317-318.

4 Summer Time Act 1972 s 3(2).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(6) COMMENCEMENT, DURATION AND AREA OF RISK/(i) Time Policies: Mixed Policies/304. Risks covered by time policy.

304. Risks covered by time policy.

In the absence of any stipulation to the contrary, a time policy¹ covers the ship on whatever voyage or service she may be engaged during the insured period². However, the policy may well except certain geographical areas, either entirely or for certain seasons of the year, for instance, 'warranted no St Lawrence between 1 October and 1 April'³.

1 For the meaning of 'time policy' see PARA 222 ante.

2 See *Dudgeon v Pembroke* (1877) 2 App Cas 284, HL; *Thompson v Hopper* (1856) 6 E & B 172; *Fawcus v Sarsfield* (1856) 6 E & B 192.

3 *Birrell v Dryer* (1884) 9 App Cas 345, HL; s*Simpson Steamship Co v Premier Underwriting Association Ltd* (1905) 10 Com Cas 198; and see *Mountain v Whittle* [1921] 1 AC 615, HL, where a houseboat was insured under a time policy while anchored in a certain river, 'including all risk of docking... as may be required during the currency of this policy'. The boat sank outside a yard which was in a different river and some seven miles from her anchorage. This yard was the nearest place for cleaning and repairs. It was held that the assured was entitled to recover by virtue of the docking clause. See also *Wilson v Boag* [1956] 2 Lloyd's Rep 564, NSW SC (loss occurring within the area covered by the policy recoverable although the launch was in the course of proceeding to a place outside it). As to express warranties see PARAS 238-244 ante; and as to mixed policies see PARA 305 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(6) COMMENCEMENT, DURATION AND AREA OF RISK/(i) Time Policies: Mixed Policies/305. Mixed policies.

305. Mixed policies.

Time policies¹ are sometimes made in which not only is the time specified for which the risk is insured, but the voyage is also described²; for instance the insurance may be 'at and from London to Cadiz for six months', or 'from 1 January 1994 to 1 June 1994, at and from Bristol to Marseilles etc'. These policies are called 'mixed policies'. Under them the underwriter is not liable for a loss that has not occurred within the insured period, nor is he liable for any loss unless the ship originally sailed on the voyage described in the policy and was at the time of the loss sailing on the prescribed course between the termini of the voyage³.

1 For the meaning of 'time policy' see PARA 222 ante.

2 Marine Insurance Act 1906 s 25(1). As to extension of risk for a period of time beyond the voyage covered by a voyage policy see PARA 306 post.

3 *Way v Modigliani* (1787) 2 Term Rep 30; *Robertson v French* (1803) 4 East 130; see also *Johnson & Co Ltd v Bryant* (1896) 1 Com Cas 363; *Maritime Insurance Co Ltd v Alianza Insurance Co of Santander* [1907] 2 KB 660; *Difiori v Adams* (1884) 53 LJQB 437.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(6) COMMENCEMENT, DURATION AND AREA OF RISK/(ii) Voyage Policies/A. COMMENCEMENT AND DURATION OF RISK ON GOODS/306. Commencement of risk on goods.

(ii) Voyage Policies

A. COMMENCEMENT AND DURATION OF RISK ON GOODS

306. Commencement of risk on goods.

If goods are insured 'from the loading thereof ' the risk does not attach until they are actually on board, and the insurer is not liable for a loss occurring while they are in transit from the shore to the ship¹.

The insurer's liability may, however, be extended by express words in the policy², and it is usual to insert in it a more extensive clause, called the 'transit clause', providing that insurance attaches from the time the goods leave the warehouse at the place named in the policy for the commencement of the transit and continues during the ordinary course of transit, until the earliest of:

- 79 (1) delivery to the final warehouse or store at the destination named in the policy³;
- 80 (2) delivery to any other warehouse or store, which the assured elects to use for storage or distribution; or
- 81 (3) the expiry of 60 days after discharge of the goods from the vessel at the final port of discharge⁴.

The transit clause provides for the attachment of the insurance at a named place⁵. However, cases decided in relation to the common clause in the Lloyd's policy⁶ suggest that if there is anything in the policy to indicate that it was intended to cover goods loaded at some place other than the place of departure of the voyage, effect will be given to that intention⁷. In particular, when it appears from the policy that the parties contemplated loading and unloading, bartering or trading with goods at any intermediate ports or places in the course of the insured voyage, the policy will attach not only on goods loaded at the port of departure, but also on those loaded at any of the ports or places where the ship is empowered to touch and trade under the terms of the policy⁸.

1 Marine Insurance Act 1906 s 30(2), Sch 1 r 4. As to the effect of insurance 'from' a particular place see PARA 311 post. Where a reinsurance was effected on goods already afloat 'on a voyage from Spain to Antwerp', but the slip also stated that the carrying vessel had been reported from Gibraltar, the court held, after hearing evidence of usage as to the meaning of the 'slip', that the risk was limited to the voyage from Gibraltar to Antwerp: *Eagle, Star and British Dominions Insurance Co Ltd v Reiner* (1927) 43 TLR 259.

2 *Hurry v Royal Exchange Assurance Co* (1801) 2 Bos & P 430 at 435. See further the text and notes infra; and PARA 310 post.

3 For the interpretation of this part of the clause see *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd* [2002] EWCA Civ 1605, [2002] 2 All ER (Comm) 1095.

4 See the Institute Cargo Clauses (A) cl 8, (B) cl 8, (C) cl 8. These clauses also contain provision (1) covering the goods up to the commencement of the forwarding of the goods to a destination other than that for which they are insured; and (2) whereby the goods are held covered in the event of other transshipment or delay in excess of the time limits fixed by the clause arising from circumstances beyond the assured's control. In *Ide and Christie v Chalmers and White* (1900) 5 Com Cas 212 at 216 it was found as a fact that a transit clause was

usually inserted in Lloyd's policies. The 'shipper's or manufacturer's warehouse' need not be at the port of shipment, but must be within a reasonable distance of that port: *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 34 Com Cas 23, CA; contrast *Re Traders and General Insurance Association Ltd, ex p Continental and Overseas Trading Co Ltd* [1924] 2 Ch 187. If the goods cease to be in transit, they will no longer be covered by the policy, even though not yet delivered to their final destination: *Deutsch-Australische Dampfschiffs-gesellschaft v Sturge* (1913) 109 LT 905; and cf *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L Rep 75, HL, cited in PARA 323 note 8 post. By appropriating the goods to a particular voyage at the time of shipment, cover was obtained retrospectively for the goods in respect of the risks of inland transport: *Wünsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep 8, CA. If the overall voyage insured is not embarked upon the risk will not attach under the transit clause: *Nima SARL v Deves Insurance Public Co Ltd* [2002] EWCA Civ 1132, [2002] 2 All ER (Comm) 449. Goods held in a warehouse for which contractual arrangements for sale had been made prior to their being ordered and delivered to the warehouse were covered by the transit clause: *Eurodale Manufacturing Ltd (t/a Connekt Cellular Communications) v Ecclesiastical Insurance Office plc* [2003] EWCA Civ 203, [2003] All ER (D) 106 (Feb). For the meaning of 'port of discharge' see PARA 308 post.

5 See text and note 3 supra.

6 It has been held that the risk is only to attach upon goods loaded on board the ship at the place of departure of the voyage, even though it was known to the insurers that the policy was intended to protect goods loaded at some other port: *Spitta v Woodman* (1810) 2 Taunt 416; *Robertson v French* (1803) 4 East 130; *Horneyer v Lushington* (1812) 15 East 46; *Langhorn v Hardy* (1812) 4 Taunt 628; *Mellish v Allnutt* (1813) 2 M & S 106; *Rickman v Carstairs* (1833) 5 B & Ad 651; *Gladstone v Clay* (1813) 1 M & S 418 at 424. As to the limits of the port or place mentioned as the place of departure at which the goods are to be loaded see *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, CA; *Payne v Hutchinson* (1810) 2 Taunt 405n; *Constable v Noble* (1810) 2 Taunt 403; *Moxon v Atkins* (1812) 3 Camp 200. This very strict construction, which is often not in accordance with the parties' intention, has, however, been disapproved: *Carr v Montefiore* (1864) 5 B & S 408 at 430, Ex Ch. If the goods, although originally loaded elsewhere, are wholly, or in part, first landed and then reloaded at the place of departure of the voyage, this is a sufficient loading on board the ship at that port to make the policy attach: *Carr v Montefiore* supra; *Nonnen v Reid*, *Nonnen v Kettlewell* (1812) 16 East 176.

7 *Bell v Hobson* (1812) 16 East 240; *Joyce v Realm Marine Insurance Co* (1872) LR 7 QB 580.

8 *Gladstone v Clay* (1813) 1 M & S 418; *Violett v Allnutt* (1811) 3 Taunt 419; *Grant v Delacour* (1806) cited in 1 Taunt at 465; *Grant v Paxton* (1809) 1 Taunt 463; *Barclay v Stirling* (1816) 5 M & S 6; *Leathly v Hunter* (1831) 7 Bing 517, Ex Ch.

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306 Commencement of risk on goods

NOTE 4--*Eurodale*, cited, reported at [2003] Lloyd's Rep IR 444.

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307. Policy from a foreign port for a homeward voyage.

A policy on goods at and from a foreign port for the homeward voyage protects only the homeward cargo, and only from the time when it is wholly or partially loaded on board at the foreign port¹.

In a policy on a voyage during which goods were intended to be loaded and bartered at different places, there was commonly a clause, 'outward cargo is to be considered homeward interest 24 hours after arrival at first place of trade'. The effect of this clause is that the policy will simultaneously cover the original and the new cargoes on board, but not any goods which are on land and are not shipped goods².

1 *Forbes v Cowie* (1808) 1 Camp 520; *Forbes v Aspinall* (1811) 13 East 323 (homeward freight); *Rickman v Carstairs* (1833) 5 B & Ad 651. See also PARA 312 post.

2 *Tobin v Harford* (1864) 17 CBNS 528, Ex Ch; *Joyce v Realm Marine Insurance Co* (1872) LR 7 QB 580; cf *Harrison v Ellis* (1857) 7 E & B 465.

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308. Termination of risk on goods.

The transit clauses specify the termination of the risk on goods¹.

The port of discharge is either the particular port which is named in the policy for that purpose, or that which, by reason of the terms of the policy or the usage of trade, is inferred to be intended by the parties. Sometimes the place named in the policy as the place of discharge is a district containing several ports; in that case, generally speaking, the policy will protect the outward cargo until the whole of it has been or, in the usual course of trade, ought to have been safely landed² at that port in the district which, for the reasons given above, is taken to be the ultimate port of discharge contemplated by the parties³.

1 See PARA 306 text and notes 3-4 ante.

2 As to the meaning of 'safely landed' see PARA 309 post.

3 *Barras v London Assurance* (1782) 1 Park's Marine Insurances (8th Edn) 74; *Leigh v Mather* (1795) 1 Esp 411; *Richardson v London Assurance Co* (1814) 4 Camp 94; cf *Oliverson v Brightman* (1846) 8 QB 781; and see *Brown v Vigne* (1810) 12 East 283 (policy on ship).

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309. Time within and manner in which the goods are to be landed.

For goods to be safely landed¹ they must be landed in the customary manner, and within a reasonable time after their arrival at the port of discharge²; if they are not so landed the risk will cease³. The extent of that reasonable time depends upon the nature and usages of the trade on which the ship is engaged, the object of the adventure and the circumstances existing at the port of discharge⁴.

1 See PARA 308 ante. Note that the concept of safe landing as the point at which insurance is to cease is of limited application under the transit clauses, which anticipate the delivery of the goods to a warehouse or store, except where the insurance ceases on the expiry of 60 days after discharge of the goods; see PARA 306 text and notes 3-4 ante.

2 Marine Insurance Act 1906 s 30(2), Sch 1 r 5. See *Parkinson v Collier* (1797) 2 Park's Marine Insurances (8th Edn) 653 (African barter trade); *Noble v Kennoway* (1780) 2 Doug KB 510.

3 Marine Insurance Act 1906 Sch 1 r 5.

4 See CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 692-694.

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310. Transhipment.

Where a policy gives express permission to tranship, the goods remain covered by the policy both in the course of transhipment and when on board the vessel into which they are transhipped¹.

Where, in the absence of such express permission, under a policy providing for 'all risk of craft until the goods are discharged and safely landed', the goods are put into lighters at the port of destination not for the purpose of being landed but for transhipment into vessels bound for another port, the loss of the goods when in these lighters is not covered by the policy, for such transhipment in fact amounts to the abandonment of the insured voyage².

On the other hand, even though the policy contains no such express permission to tranship, the goods will nevertheless remain covered if transhipment becomes necessary by reason of a peril insured against. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other movables³ or in transhipping them and sending them on to their destination, the insurer's liability continues notwithstanding the landing or transhipment⁴.

By the insertion of express words in a marine policy its protection may be prolonged after the landing of the goods and during their subsequent transport overland⁵.

1 *Tierney v Etherington* (1743) cited in 1 Burr at 348-349 (there cited by Lord Mansfield); *Oliveron v Brightman, Bold v Rotheram* (1846) 8 QB 781 at 797; *Neale and Wilkinson v Rose* (1898) 3 Com Cas 236; *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* [1919] WN 308, CA; cf *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668 at 676, Ex Ch.

2 *Houlder v Merchants Marine Insurance Co* (1886) 17 QBD 354, CA. It is submitted that the true ground of decision in that case is that stated in the text. See *Oliveron v Brightman, Bold v Rotheram* (1846) 8 QB 781 at 797, 808; and cf *Deutsch-Australische Dampschiffs-gesellschaft v Sturge* (1913) 109 LT 905, cited in PARA 306 note 4 ante.

3 For the meaning of 'movables' see PARA 217 note 3 ante.

4 Marine Insurance Act 1906 s 59. See also *Plantamour v Staples* (1781) 1 Term Rep 611n; *Oliveron v Brightman, Bold v Rotheram* (1846) 8 QB 781 at 797, 808; *De Cuadra v Swann* (1864) 16 CBNS 772.

5 *Rodocanachi v Elliott* (1873) LR 8 CP 649; *Simon, Israel & Co v Sedgwick* [1893] 1 QB 303, CA. In *Wingate v Foster* (1878) 3 QBD 582, CA, where a policy contained a special clause to protect certain pumps used in salvage operations, an attempt was made to apply this doctrine to their transit to a port of refuge not provided for by the policy, but it was held that this formed no part of the insured voyage; and, as will be shown later (see PARA 322 post), the risk is always put an end to by unexcused deviation or by abandonment of the voyage insured. As to the effect of transferring the property in the goods before the loss and without assigning the policy see *Ionides v Harford* (1859) 29 LJEx 36; *North of England Oil-Cake Co v Archangel Insurance Co* (1875) LR 10 QB 249; and PARA 389 post.

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B. COMMENCEMENT AND DURATION OF RISK ON SHIP

311. Insurance 'from' a particular place.

Where the subject matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage insured¹. The ship is not deemed to have started on the voyage until, being in a state of complete preparation for the insured voyage, she has quitted her moorings and broken ground².

¹ Marine Insurance Act 1906 s 30(2), Sch 1 r 2.

² As to what constitutes a starting or sailing on the insured voyage see *Pittegrew v Pringle* (1832) 3 B & Ad 514 (crossing the bar without full ballast not a sailing); *Cockrane v Fisher* (1835) 1 Cr M & R 809, Ex Ch (every effort made to sail); *Hunting & Son v Boulton* (1895) 1 Com Cas 120 (sailing although still within limits of port); *Sea Insurance Co v Blogg* [1898] 2 QB 398, CA (anchorage moved preparatory to sailing not a sailing); and see PARA 240 ante.

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312. Insurance 'at and from' a particular place.

Where a ship¹ is insured 'at and from'² a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately³. If she is not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival⁴.

The ship is deemed to be in good safety, even if seriously damaged, if she is in such a condition as to enable her to lie at the port of departure in reasonable security until she is properly repaired and equipped for her insured voyage⁵.

The application, however, of this rule, which determines only the prima facie meaning of the clause 'at and from', may be excluded or modified by the terms of the policy construed by the light of the surrounding circumstances⁶.

1 'Ship' includes hovercraft: see PARA 294 ante.

2 As to insurances 'at' and 'only against harbour risks' see PARA 317 note 5 post.

3 Marine Insurance Act 1906 s 30(2), Sch 1 r 3(a).

4 Ibid Sch 1 r 3(b), which is in accordance with *Haughton v Empire Marine Insurance Co* (1866) LR 1 Exch 206. Where, however, the vessel is covered by successive policies with the same underwriter, it may be held that the later was intended to attach in substitution for the earlier: *Union Marine Insurance Co Ltd v Martin* (1866) 35 LJCP 181.

5 *Forbes v Wilson* (1800) 1 Park's Marine Insurances (8th Edn) 472; *Annen v Woodman* (1810) 3 Taunt 299. It seems probable from the Marine Insurance Act 1906 ss 6, 30 (see PARAS 225 ante, 372 post), that under a policy 'at and from' ... 'lost or not lost', the risk attaches as from the earliest time when the ship was in the port of departure in good safety: see the discussion in Arnould on Marine Insurance (16th Edn) s 543. In *Bell v Bell* (1810) 2 Camp 475 there was a policy on ship 'at and from Riga to the United Kingdom', and immediately after the arrival of the ship at Riga her papers were seized, and both ship and cargo were later sequestered before discharge had taken place. Lord Ellenborough CJ ruled that the policy attached because the ship was in physical safety from the perils insured against, even though not free from political danger. In order to discharge an insurer on a ship insured until 'moored twenty-four hours in good safety' she must be not only in physical safety but also in political safety (see PARA 316 post); and it seems somewhat doubtful whether under the Marine Insurance Act 1906 Sch 1 r 3, the policy attaches at a time when, although the ship is in physical safety, the assured is by the act of a political authority deprived of her possession or control.

6 *Hunting & Son v Boulton* (1895) 1 Com Cas 120 at 122.

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313. Adventure must be commenced within a reasonable time.

Where the subject matter is insured by a voyage policy 'at and from' or 'from' a particular place, it is not necessary that the ship¹ should be at that place when the contract is concluded, but there is an implied condition that the adventure must be commenced within a reasonable time, and that if the adventure is not so commenced the insurer may avoid the contract². This implied condition, however, may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition³.

The question what is a reasonable time is a question of fact⁴. Before the passing of the Marine Insurance Act 1906 it had been decided that the contract was voidable if the delay in arriving at the port where the insured risk was to commence was such as materially to alter the risk, for instance to change a summer risk into a winter risk, and this although the delay was occasioned by perils of the seas or other unavoidable causes⁵. It is unclear whether the same test should be applied under the Act⁶; but, in any case, when the policy has once attached by the ship's arrival at the port where the insured risk is to commence, a detention there for a reasonable time for the purpose of the insured adventure is allowed, and whether the time is reasonable is a question of fact to be determined by the state of things existing in the port⁷.

1 'Ship' includes hovercraft: see PARA 294 ante.

2 Marine Insurance Act 1906 s 42(1).

3 Ibid s 42(2). This provision settled one of the points left undecided in *De Wolf v Archangel Insurance Co* (1874) LR 9 QB 451.

4 Marine Insurance Act 1906 s 88.

5 *Hull v Cooper* (1811) 14 East 479; *De Wolf v Archangel Insurance Co* (1874) LR 9 QB 451; *Maritime Insurance Co v Stearns* [1901] 2 KB 912.

6 In Arnould on Marine Insurance (16th Edn) s 545, the view is expressed that the test is not applicable after the passing of the Marine Insurance Act 1906 s 42(2); earlier editions of that and this work have expressed the opposite.

7 *Camden v Cowley* (1763) 1 Wm Bl 417; *Cruikshank v Janson* (1810) 2 Taunt 301; *Warre v Miller* (1825) 4 B & C 538; *Brown v Tayleur* (1835) 4 Ad & El 241; *Raine v Bell* (1808) 9 East 195; *Phillips v Irving* (1844) 7 Man & G 325 at 328. It seems that delay in executing repairs at the port will not put an end to the risk unless the delay is such as to amount to an abandonment of the insured adventure: *Chitty v Selwin and Martyn* (1742) 2 Atk 359 per Lord Hardwicke LC; *Grant v King* (1802) 4 Esp 175; *Smith v Surridge* (1801) 4 Esp 25. See also *Palmer v Marshall* (1832) 8 Bing 317; and *Palmer v Fenning* (1833) 9 Bing 460 at 462 per Park J, where the delay discharged the underwriters.

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314. Meaning of 'port'.

Where the terminus 'at and from' which the voyage is to commence is a port named in the policy, the name is, as a general rule, presumed to mean that place which in the ordinary commercial sense is considered the port, and not to extend to all the different places it may comprise for purposes of revenue, or which may be included in the technical legal meaning of the word 'port'¹.

Where the policy is 'at and from' an island or other district containing several ports, the risk on ship commences as soon as the ship has arrived in good safety at the first port at which she touches on the island for the purpose of discharging her outward cargo. Thus, a ship insured for a homeward voyage 'at and from' any of the islands of the West Indies is protected by the word 'at' in going from port to port of the island².

¹ *Constable v Noble* (1810) 2 Taunt 403; *Payne v Hutchinson* (1810) 2 Taunt 405n; *Brown v Tayleur* (1835) 4 Ad & El 241; *Kingston-upon-Hull Dock Co v Browne* (1831) 2 B & Ad 43; *Stockton and Darlington Rly Co v Barrett* (1844) 7 Man & G 870, HL; *Van Baggen v Baines* (1854) 9 Exch 523; *Garston Sailing Ship Co v Hickie* (1885) 15 QBD 580, CA; *Hunter v Northern Marine Insurance Co* (1888) 13 App Cas 717 at 722, 726, 733, HL; see also *Kingston v Knibbs* (1808) 1 Camp 508n; *Cockey v Atkinson* (1819) 2 B & Ald 460; *De Longuemere v Firemen Insurance Co* 10 Johns (NY) 126 (1813); *Sea Insurance Co Scotland v Gavin* (1829) 4 Bli NS 578, HL; *Maritime Insurance Co Ltd v Alianza Insurance Co of Santander* [1907] 2 KB 660; cf *Roelandts v Harrison* (1854) 9 Exch 444. As to the meanings of 'arrival at port' and 'safe port' in connection with charterparties see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 408, 518.

² *Camden v Cowley* (1763) 1 Wm Bl 417; *Warre v Miller* (1825) 4 B & C 538; see also *Kynance Sailing Ship Co Ltd v Young* (1911) 27 TLR 306.

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315. Modification of rules by usage.

The general rules as to when the risk attaches, like all other rules of construction, are subject to modifications in accordance with the usage of particular trades¹.

¹ Thus, in the Newfoundland trade, owing to the well-known practice of making fishing expeditions or intermediate trading voyages after the ship's first arrival off the coast of Newfoundland, the risk under policies for the homeward voyage, although expressed to be 'at and from' any port or ports in Newfoundland, was held not to attach upon the ships on their first arrival out, but only from their beginning to prepare for the homeward voyage: *Vallance v Dewar* (1808) 1 Camp 503. As to what is meant by 'preparing for the ship's voyage' in a clause describing the commencement of the risk see *Lambert v Liddard* (1814) 5 Taunt 480 at 486.

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316. Termination of risk by completion of voyage.

Where in a voyage policy¹ the risk on a ship is expressed to continue 'until she has moored at anchor 24 hours in good safety'², the ship is not deemed to have been moored for 24 hours in good safety unless she has been moored for that space of time under the three conditions described below.

- 82 (1) She must have been moored in such a state of physical safety that she can keep afloat while the cargo is being unloaded. This condition is not satisfied when the vessel arrives as a mere wreck and is in a sinking state when she is moored, but it is satisfied if she arrives at the ordinary place of discharge, and, even though seriously damaged, is able there to keep afloat, and is kept afloat more than 24 hours after being so moored³.
- 83 (2) The ship must have been for the 24 hours in a state of political safety. This condition is not satisfied if, for instance, she has been laid under an embargo, or if steps have been taken to seize her so that she is no longer in her owners' possession and control⁴.
- 84 (3) She must have been moored for more than 24 hours in such circumstances that she has an opportunity of unloading and discharging at the place where she in fact intends to discharge. This condition is not satisfied if, for instance, she has been ordered into quarantine during the 24 hours⁵.

If, however, the ship is moored in such a place and in such circumstances that she has only to wait until her turn for unloading comes without again unmooring, this is held to be a mooring in good safety⁶.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 As to the termination of the risk by deviation, delay and abandonment of the voyage see PARAS 322-329 post.

3 *Shawe v Felton* (1801) 2 East 109; *Lidgett v Secretan* (1870) LR 5 CP 190 at 198-200.

4 *Minett v Anderson* (1794) Peake 277; *Horneyer v Lushington* (1812) 15 East 46 at 47; and see *Lockyer v Offley* (1786) 1 Term Rep 252. It seems clear that mere liability to seizure is not inconsistent with 'good safety'. See *Lockyer v Offley* supra at 261 per Willes J; *Lidgett v Secretan* (1870) LR 5 CP 190 at 199.

5 *Samuel v Royal Exchange Assurance Co* (1828) 8 B & C 119; *Whitwell v Harrison* (1848) 2 Exch 127; *Lindsay v Janson* (1859) 4 H & N 699; *Stone v Marine Insurance Co Ocean Ltd of Gothenburg* (1876) 1 Ex D 81. If the 24 hours clause is struck out of the policy, the risk will cease as soon as the ship is at her moorings in safety: *Stone v Marine Insurance Co Ocean Ltd of Gothenburg* supra at 85; cf *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 KB 40, CA.

6 *Angerstein v Bell* (1795) 1 Park's Marine Insurances (8th Edn) 54.

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317. Risk may be prolonged by express stipulation.

The risk may be prolonged for a period of time beyond the termination of the insured voyage by express stipulations in the policy¹, or by usage annexing incidents to the contract². In the former case effect will, in the absence of some reason to the contrary, be given to the '24 hours' clause by making the period contained in the express stipulation run from the expiration of 24 hours after the ship has moored at anchor³.

Where the ship is insured to an island or other district comprising several ports, the risk will continue until the ship has moored 24 hours in good safety at the port at which she was intended to unload and at which the master actually breaks bulk for the purpose of unloading the whole or the greater part of her cargo⁴.

A policy on ship to ports in a specified country or district may, however, be so worded that the risk does not end even at the last port of discharge; for instance, the insurance may be to any 'port or ports on the west coast of South America and for 30 days after arrival in final port however employed'. In that case the last two words will prevent the other words, 'port or ports' and 'final port', from being limited to ports of discharge⁵.

1 These stipulations have been considered in *Mercantile Marine Insurance Co v Titherington* (1864) 5 B & S 765; *Gambles v Ocean Marine Insurance Co of Bombay* (1876) 1 Ex D 141, CA; *Hunter v Northern Marine Insurance Co* (1887) 14 R 544, Ct of Sess; *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 KB 40, CA.

2 *Preston v Greenwood* (1784) 4 Doug KB 28; *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341; *Brough v Whitmore* (1791) 4 Term Rep 206; and see PARAS 232-234 ante.

3 *Mercantile Marine Insurance Co v Titherington* (1864) 5 B & S 765. This question was left open in *Lidgett v Secretan* (1870) LR 5 CP 190 at 199, but no doubt was thrown upon the former case. The days of the extended period are reckoned as periods of 24 hours from the termination of the voyage risk: *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 KB 40, CA, where the 24 hours clause was struck out.

4 *Camden v Cowley* (1763) 1 Wm Bl 417; *Barras v London Assurance* (1782) 1 Park's Marine Insurances (8th Edn) 74; *Leigh v Mather* (1795) 1 Park's Marine Insurances (8th Edn) 74; *Inglis v Vaux* (1813) 3 Camp 437; *Moore v Taylor* (1834) 1 Ad & El 25; and see note 3 supra. Sometimes the ship is insured to her 'port of discharge' or her 'port or ports of discharge' or to her final 'port of discharge or destination'. As to the meaning which has been given to these words see *Clason v Simmonds* (1741) cited in 6 Term Rep at 533; *Moffat v Ward* (1784) 4 Doug KB 29n; *Preston v Greenwood* (1784) 4 Doug KB 28 at 33; *Moore v Taylor* supra. The words 'last port of discharge' have been held to mean the last practicable friendly port of discharge (*Brown v Vigne* (1810) 12 East 283 at 288 per Bayley J), because a hostile port could not have been in the contemplation of the parties at the time the policy was effected (*Neilson v De Lacour* (1797) 2 Esp 618).

5 *Crocker v Sturge* [1897] 1 QB 330; *Spalding v Crocker* (1897) 2 Com Cas 189; and see *Crocker v General Insurance Co Ltd of Trieste* (1897) 3 Com Cas 22, CA. Contrast *Marten v Vestey Bros Ltd* [1920] AC 307, HL, where 'final port' was held to mean the final port of discharge. Sometimes the insurance is only 'at' a place, and sometimes only against harbour risks. As to when the risk terminates in such a case see *Maritime Insurance Co Ltd v Alianza Insurance Co of Santander* [1907] 2 KB 660; *Hunting & Son v Boulton* (1895) 1 Com Cas 120; *Kynance Sailing Ship Co Ltd v Young* (1911) 27 TLR 306. Ships are also sometimes insured against fire when in dock or when in river with liberty to go into a dry dock, or sometimes in harbour while securely moored. As to when the risk in those cases terminates see --v *Westmore* (1807) 6 Esp 109; *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498; *Grant v Aetna Insurance Co* (1862) 15 Moo PCC 516.

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C. COMMENCEMENT AND DURATION OF RISK ON FREIGHT

318. Commencement of insurance on freight.

In order to recover on a policy on freight¹ the assured must not only have an insurable interest² at the time of the loss, but the policy must be so worded as to make the risk attach before the loss. Thus, where a policy which is effected on freight 'at and from' a certain port of loading also contains a clause that the freight is to be covered 'from the time of the engagement of the goods', the assured has an insurable interest as soon as the goods are engaged, but he cannot recover for a loss of freight due to the loss of the ship if that loss occurs before she has reached the port of loading³.

Where freight, other than chartered freight, is payable without special conditions and is insured 'at and from' a particular place, the risk attaches pro rata as the goods or merchandise are shipped, but if there is cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship⁴, the risk attaches as soon as the ship is ready to receive that cargo⁵.

In order, therefore, that the policy may cover freight on goods not shipped, two conditions must be fulfilled before or at the time of the loss:

- 85 (1) the goods must belong to the shipowner or there must be a binding contract with some other person to ship them; and
- 86 (2) the goods must be in readiness to be shipped and the ship must be ready to receive them⁶.

As regards the first condition, this rule is in accordance with decided cases⁷.

As regards the second condition, it remains to be seen whether the English courts will interpret the rule so as to bring it into accordance with the decisions given before the passing of the Marine Insurance Act 1906 by holding that the goods are ready to be shipped and the ship is ready to receive them if the ship is at the shipper's disposal in the sense that she would load but for some preventing cause such as lack of facilities for loading⁸.

1 For the meaning of 'freight' see PARA 296 ante.

2 As to insurable interest see PARA 366 et seq post.

3 *The Copernicus* [1896] P 237, CA; cf *Jones v Neptune Marine Insurance Co* (1872) LR 7 QB 702; see also *Eagle, Star and British Dominions Insurance Co Ltd v Reiner* (1927) 43 TLR 259, cited in PARA 306 note 1 ante.

4 Even when the insurance is on freight 'chartered or as if chartered', the risk will not attach unless there is a binding agreement to load or procure a cargo, or at any rate a binding agreement to use diligence to procure a cargo: *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51.

5 Marine Insurance Act 1906 s 30(2), Sch 1 r 3(d).

6 See *ibid* Sch 1 r 3(d).

7 The principal cases on this subject are *Montgomery v Eggington* (1789) 3 Term Rep 362 (which virtually overruled the decision of Lee J in *Tonge v Watts* (1746) 2 Stra 1251); *Flint v Flemyng* (1830) 1 B & Ad 45; *Forbes v Aspinall* (1811) 13 East 323; *Patrick v Eames* (1813) 3 Camp 441.

8 These cases are *Parke v Hebson* (1820) cited in 2 Brod & Bing at 326; *Warre v Miller* (1825) 4 B & C 538; *Devaux v J'Anson* (1839) 5 Bing NC 519; *Flint v Flemyng* (1830) 1 B & Ad 45. In *Truscott v Christie* (1820) 2 Brod & Bing 320 at the time of the loss the vessel was being altered to make her able to accommodate 200 invalids; the alterations were not completed at the time of the loss, yet the court held that the assured could recover on a policy on the passage money. Again, in *Devaux v J'Anson* supra, although the ship was at the time of the loss in dry dock and not in the place where she was to receive her cargo, the assured recovered under a policy on freight. It is, on the other hand, to be observed that the rule in question is in accordance with the dictum of Lord Ellenborough CJ in *Forbes v Aspinall* (1811) 13 East 323 at 331, and with the ruling of Lord Lyndhurst CB in *Williamson v Innes* (1831) 8 Bing 81n. Lord Ellenborough's dictum, however, was not necessary for the decision of the case, and Lord Lyndhurst's ruling was only a ruling at Nisi Prius.

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319. Commencement of risk on chartered freight.

Whether the risk has at the time of the loss attached to the insurable interest¹ in freight² depends upon the terms of the policy. Where the policy is on chartered freight and the insurance is 'at and from' a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately; if she is not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety³.

An insurance on freight 'at and from' a place does not cover the freight on a voyage terminating at that place, for that freight is not at risk on the voyage described in the policy. Thus, when freight was insured at and from Riga to the United Kingdom and the ship was captured at Riga, it was held that the policy did not cover the freight on the outward voyage to Riga⁴. If suitable wording is employed, chartered freight may be at risk before the beginning of the voyage on which it is to be carried⁵.

In policies on chartered freight the commencement of the risk may be made to depend on a certain event, for instance, the loading of the goods on board ship at a certain port or simply from the loading of the vessel. In these cases the risk does not attach until the happening of the specified event⁶.

1 As to insurable interest see PARA 366 et seq post.

2 For the meaning of 'freight' see PARA 296 ante.

3 Marine Insurance Act 1906 s 30(2), Sch 1 r 3(c). This rule must of course be read subject to Sch 1 r 1 (see PARAS 312 ante, 372 post), and subject also to any conditions precedent to the underwriter's liability such as the seaworthiness of the ship etc. See also *Sellar v M'Vicar* (1804) 1 Bos & PNR 23 (ship never arrived at the starting point of the insured voyage); *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500, CA.

4 *Bell v Bell* (1810) 2 Camp 475.

5 *Rankin v Potter* (1873) LR 6 HL 83; *Barber v Fleming* (1869) LR 5 QB 59.

6 *Beckett v West of England Marine Insurance Co Ltd* (1871) 25 LT 739, distinguished in *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500, CA, and criticised at 509 by Rigby LJ; *Hopper v Wear Marine Insurance Co* (1882) 46 LT 107; *Jones v Neptune Marine Insurance Co* (1872) LR 7 QB 702.

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320. Termination of risk on freight.

Under a voyage policy¹ on freight², unless there is some stipulation to the contrary, the risk continues as long as the goods remain in the shipowner's custody exposed to maritime perils³, provided there is no unjustifiable delay in discharging them⁴. In the case of a time policy⁵ on freight, the rules relating to the termination of the risk are the same as those which apply to insurances on ships⁶.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 For the meaning of 'freight' see PARA 296 ante.

3 For the meaning of 'maritime perils' see PARA 217 ante.

4 Marshall on Marine Insurance (4th Edn) 225; *Atty v Lindo* (1805) 1 Bos & PNR 236. Advance freight paid under a charterparty may continue at risk, although a stage of the adventure has been accomplished, and cargo carried in that stage delivered: *Ellis v Lafone* (1853) 8 Exch 546, Ex Ch.

5 For the meaning of 'time policy' see PARA 222 ante.

6 For the rules as to termination of the risk relating to insurances on ships see PARAS 302, 311 et seq ante.

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(iii) The Voyage Insured: Change of Voyage, Deviation and Delay

321. The voyage insured.

A voyage policy¹ specifies the voyage insured, that is to say the voyage intended to be covered by the policy. It is, however, only necessary that the place at which the voyage is to commence and the place at which it is to end should be stated. These places are respectively called the 'terminus a quo' and the 'terminus ad quem'. It is sufficient that these termini should be named in the policy, because, in the absence of some provision to the contrary, the ship is bound to proceed from one terminus of the voyage insured to the other with all due expedition, and without trading at any intermediate places, by the usual and customary course, or, if there is more than one such course, by one of them². Thus, the proper course of the insured voyage, or, more briefly, the 'insured voyage', is determined by the termini named in the policy, the underwriter being presumed to be cognisant of the usual and customary course or courses³.

Where the place of departure is specified by the policy, and the ship, instead of sailing from that place, sails from any other place, the risk does not attach⁴, nor does it attach when the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination⁵.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 See eg *Brown v Tayleur* (1835) 4 Ad & El 241; *Redman v Lowdon* (1814) 5 Taunt 462.

3 See *The Indian City* [1939] AC 562, [1939] 3 All ER 444, HL (a charterparty case), which also decided that a customary course need not be proved with the strictness of a legal usage.

4 Marine Insurance Act 1906 s 43.

5 Ibid s 44; *Nima SARL v Deves Insurance Public Co Ltd* [2002] EWCA Civ 1132, [2002] 2 All ER (Comm) 449.

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322. Change of voyage and deviation.

A departure from the proper course of the insured voyage¹ may arise from what is called 'a change of voyage' or from 'deviation'. It is important to note the distinction between these two modes of departure because of their very different effect on the underwriter's liability².

Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage³. Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of the change, that is to say as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs⁴.

There is a deviation from the voyage contemplated by the policy where:

- 87 (1) the course of the voyage is specifically designated by the policy, and that course is departed from; or⁵
- 88 (2) the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from⁶.

The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract⁷. Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs⁸.

1 As to the insured voyage see PARA 321 ante.

2 See further PARA 323 post. As to the contractual rights and liabilities consequent on deviation as between shipowner and charterer see CARRIAGE AND CARRIERS vol 7 (2008) PARA 248.

3 Marine Insurance Act 1906 s 45(1).

4 Ibid s 45(2).

5 Ibid s 46(2)(a).

6 Ibid s 46(2)(b). Evidence is admissible to show what is the usual or a usual route. If the evidence is sufficient to establish a practice to follow a particular route, proceeding by that route is not a deviation: *The Indian City* [1939] AC 562, [1939] 3 All ER 444, HL (charterparty).

7 Marine Insurance Act 1906 s 46(3); *Thellusson v Fergusson* (1780) 1 Doug KB 360 at 365.

8 Marine Insurance Act 1906 s 46(1). As to what are lawful excuses see s 49; and PARA 328 post.

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323. Change of voyage and deviation distinguished.

There is a change of voyage when a purpose of abandoning the original place of destination for some other place of discharge is definitely formed¹, and as soon as that purpose is definitely formed and manifested the insurer is, by that fact itself, discharged from liability for all subsequent losses². If the resolution is formed after the commencement of the risk, the voyage is said to be changed³.

There is deviation when, without any design of abandoning the original destination, there is an actual departure from the course of the insured voyage⁴, and in that case, whether the risk is increased by the deviation or not, the insurer is discharged from liability for all losses occurring after the actual departure⁵, but he remains liable for all previous losses⁶.

It is a question of fact whether a departure from the proper course of the insured voyage constitutes a change of voyage or only a deviation, the question being whether or not a definite resolution was formed and manifested to abandon the terminus ad quem⁷ named in the policy⁸.

1 *Wooldridge v Boydell* (1778) 1 Doug KB 16; *Driscoll v Passmore* (1798) 1 Bos & P 200.

2 *Wooldridge v Boydell* (1778) 1 Doug KB 16; *Way v Modigliani* (1787) 2 Term Rep 30; *Bottomley v Bovill* (1826) 5 B & C 210.

3 Marine Insurance Act 1906 s 45(1); *Tasker v Cunninghame* (1819) 1 Bli 87 at 100, 102, HL; and see PARA 322 ante.

4 As to the insured voyage see PARA 321 ante.

5 *Hamilton v Sheddon* (1837) 3 M & W 49; and see the cases cited in note 2 supra. Intention to deviate is not sufficient: *Thellusson v Fergusson* (1780) 1 Doug KB 360; *Kewley v Ryan* (1794) 2 Hy Bl 343; *Foster v Wilmer* (1746) 2 Stra 1249; *Heselton v Allnutt* (1813) 1 M & S 46 at 50; *Hare v Travis* (1827) 7 B & C 14; *Kingston v Phelps* (1795) cited in 7 Term Rep at 165; and see *Simpson Steamship Co v Premier Underwriting Association* (1905) 10 Com Cas 198 (same principle applied to breach of warranty in time policy).

6 *Hare v Travis* (1827) 7 B & C 14; *Kingston v Phelps* (1795) cited in 7 Term Rep at 165.

7 For the meaning of 'terminus ad quem' see PARA 321 ante.

8 *Wooldridge v Boydell* (1778) 1 Doug KB 16. See also *Marsden v Reid* (1803) 3 East 572 (vessel insured to numerous ports; it is no change of voyage if she sails for one of them only, for a voyage to all or any of the places named is intended); and see the cases cited in notes 2, 5 supra. Where a marine policy on goods covered a land transit following a sea voyage, the Court of Appeal held that to determine whether the policy ever attached the terminus ad quem of the sea voyage only must be taken into consideration: *Simon, Israel & Co v Sedgwick* [1893] 1 QB 303, CA; *Nima SARL v Deves Insurance Public Co Ltd* [2002] EWCA Civ 1132, [2002] 2 All ER (Comm) 449. The mere fact of taking in goods, and clearing for a different port from that specified in the policy as the terminus ad quem, does not by itself amount to a change of voyage: *Planché v Fletcher* (1779) 1 Doug KB 251; *Kewley v Ryan* (1794) 2 Hy Bl 343. Where goods, which were insured from the interior of Africa to any ports in Europe or the United States, were collected in the interior of Africa, taken to an ocean port, stored at that port in bulk and shipped to Europe or the United States as and when ocean steamers were available, it was held that, although it was impossible to specify the ultimate destination of the goods until they were shipped on the ocean steamer, there had been no change or abandonment of voyage because the goods were at all times destined for some port in Europe or the United States: *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L Rep 75, HL; cf *Hewitt v London General Insurance Co Ltd* (1925) 23 Ll L Rep 243.

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324. Change of voyage and deviation: special clauses.

Notice to the insurer of an intention to depart from the usual and customary course (no liberty to do so being given by the policy) will not have the effect of preventing the insurer from being discharged, although it may, with other circumstances, be evidence of his waiver of the condition not to deviate¹.

Policies of insurance now often contain a clause by which the insurer agrees to cover the assured, in case of a change of voyage or of a deviation, at an extra premium and on amended terms of cover to be arranged²; and where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens, but no arrangement is made, then a reasonable additional premium is payable³.

1 *Redman v Lowdon* (1814) 5 Taunt 462.

2 See Institute Voyage Clauses (Hulls) cl 2. The clause requires notice to be given to the insurer.

3 Marine Insurance Act 1906 s 31(2). The question of what is reasonable is a question of fact: s 88. 'Reasonable premium' means the premium which would have been charged for the risk by a reasonable insurer at the time of the deviation, abandonment or change of voyage had he then known of it: *Greenock Steamship Co v Marine Insurance Co Ltd* [1903] 1 KB 367 at 375; applied in *Mentz, Decker & Co v Marine Insurance Co Ltd* [1910] 1 KB 132. This fact renders the subject of deviation far less important than it was formerly: see *Hyderabad (Deccan) Co v Willoughby* [1899] 2 QB 530. A clause that a ship is to be held covered in case of 'deviation or change of voyage' at an extra premium has been held not to cover unreasonable delay before the commencement of the insured voyage (*Maritime Insurance Co v Stearns* [1901] 2 KB 912); nor has it any operation where the risk has never attached (*Simon, Israel & Co v Sedgwick* [1893] 1 QB 303 at 307, CA). The clause sometimes requires due notice to be given by the assured on receipt of advice, and this obligation, even if not expressed, will be implied: *Thames and Mersey Marine Insurance Co Ltd v Van Laun & Co* (1905) [1917] 2 KB 48n, HL; applied in *Hood v West End Motor Car Packing Co* [1917] 2 KB 38, CA. As to what is due notice see *Mentz, Decker & Co v Maritime Insurance Co Ltd* supra; *Hewitt v London General Insurance Co Ltd* (1925) 23 Ll L Rep 243; and PARA 397 note 1 post.

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325. 'Touch and stay' clauses.

In the absence of any further licence¹ or usage, a liberty to touch and stay 'at any port or place whatsoever' does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination². This is also generally true where there is even a clause giving liberty 'to touch and stay at any place for all purposes whatever'³.

The following are the principles which may be deduced from the cases on this subject:

- 89 (1) the extent of the powers they confer on the ship is to be judged, not so much by a literal and strict interpretation of the terms employed (such as 'to call', 'to touch' or 'to touch and stay'), as by reference to the true scope and nature of the adventure contemplated by the policy⁴;
- 90 (2) however extensive the language of these clauses may be, they can never confer a power of visiting ports out of that which, on a proper construction of the whole policy, appear to have been the course of the voyage insured as contemplated by the parties⁵;
- 91 (3) these clauses cannot justify the ship in visiting any port, even though within the local limits of the voyage insured, for any purpose unconnected with the main object of the adventure⁶;
- 92 (4) if the ship visits an allowed port for an allowed purpose, no trading, breaking bulk, landing or loading cargo, however alien to the main object of the adventure, will make the visit a deviation if the trading, breaking bulk, landing or loading cargo is completed during the period of the ship's lawful stay in that port without additional delay or substantial variation of the risk⁷;
- 93 (5) if, however, that trading gives rise to delay that would not otherwise have been incurred, it may, for the reason mentioned subsequently⁸, afford a defence to the insurer⁹.

Where the policy specifically describes the course which the ship is to take between the two termini, that course must be strictly followed, and if the policy names one intermediate port at which the ship may touch, this may bind her not to touch at any other intermediate port¹⁰.

1 For a very extensive licence in a bill of lading see *Hadji Ali Akbar & Sons Ltd v Anglo-Arabian and Persian Steamship Co Ltd* (1906) 11 Com Cas 219.

2 Marine Insurance Act 1906 s 30(2), Sch 1 r 6.

3 *Bottomley v Bovill* (1826) 5 B & C 210.

4 See *Metcalfe v Parry* (1814) 4 Camp 123; *Pratt v Ashley* (1847) 1 Exch 257, Ex Ch; *Bragg v Anderson* (1812) 4 Taunt 229; *Lambert v Liddard* (1814) 5 Taunt 480; *Violett v Allnutt* (1811) 3 Taunt 419; *Barclay v Stirling* (1816) 5 M & S 6; *Rucker v Allnutt* (1812) 15 East 278; *Andrews v Mellish* (1814) 5 Taunt 496, Ex Ch; *Armet v Innes* (1820) 4 Moore CP 150; *Hunter v Leathley* (1830) 10 B & C 858 (affd (1831) 7 Bing 517, Ex Ch); and see *Warre v Miller* (1825) 4 B & C 538.

5 *Lavabre v Wilson* (1779) 1 Doug KB 284 at 286; *Hogg v Horner* (1797) 2 Park's Marine Insurances (8th Edn) 626; *Ranken v Reeve* (1814) 2 Park's Marine Insurances (8th Edn) 627; *Gairdner v Senhouse* (1810) 3 Taunt 16, distinguished in *Bragg v Anderson* (1812) 4 Taunt 229; *Andrews v Mellish* (1814) 5 Taunt 496, Ex Ch; *Williams v Shee* (1813) 3 Camp 469; *Bottomley v Bovill* (1826) 5 B & C 210; *Hamilton v Sheddon* (1837) 3 M & W 49; *Kynance Sailing Ship Co v Young Ltd* (1911) 104 LT 397.

6 *Langhorn v Allnutt* (1812) 4 Taunt 511; *Hammond v Reid* (1820) 4 B & Ald 72; *Solly v Whitmore* (1821) 5 B & Ald 45; *Laing v Union Marine Insurance Co*, *Laing v London Assurance Corp*n (1895) 1 Com Cas 11; cf *Violet v Allnutt* (1811) 3 Taunt 419; *Leduc v Ward* (1888) 20 QBD 475 at 482, CA; *Glynn v Margetson & Co* [1893] AC 351, HL (bill of lading cases).

7 *Urquhart v Barnard* (1809) 1 Taunt 450; *Laroche v Oswin* (1810) 12 East 131; *Raine v Bell* (1808) 9 East 195; *Cormack v Gladstone* (1809) 11 East 347; *Warre v Miller* (1825) 4 B & C 538.

8 See PARA 327 post.

9 *African Merchants Co v British and Foreign Marine Insurance Co* (1873) LR 8 Exch 154.

10 Re on the principle *expressio unius est exclusio alterius*: see the Marine Insurance Act 1906 s 46(2)(a) (see PARA 322 text and note 5 ante); *Elliot v Wilson* (1776) 4 Bro Parl Cas 470, HL.

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326. Order in which ship must proceed to ports.

Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation¹.

Where the policy is to 'ports of discharge' within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them or such of them as she goes to, in their geographical order. If she does not, there is a deviation².

1 Marine Insurance Act 1906 s 47(1); *Beatson v Haworth* (1796) 6 Term Rep 531; *Marsden v Reid* (1803) 3 East 572 at 577. As to cases where a ship is insured 'at and from' one named port of departure, and 'other port or ports' see *Bragg v Anderson* (1812) 4 Taunt 229; *Lambert v Liddard* (1814) 5 Taunt 480; *Pratt v Ashley* (1847) 1 Exch 257, Ex Ch; cf *Brown v Tayleur* (1835) 4 Ad & El 241.

2 Marine Insurance Act 1906 s 47(2); *Clason v Simmonds* (1741) cited in 6 Term Rep at 533; *Andrews v Mellish* (1814) 5 Taunt 496 at 502, Ex Ch; distinguish *Kynance Sailing Ship Co Ltd v Young* (1911) 104 LT 397; and see PARA 317 ante.

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327. Delay in voyage.

In the case of a voyage policy¹ the adventure insured must be prosecuted throughout its course with reasonable dispatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable². Whenever the delay exceeds a reasonable time either at the terminus a quo, or during the voyage, or at the terminus ad quem³, or is incurred for purposes unconnected with the object of the voyage, the policy ceases to be in force⁴.

1 For the meaning of 'voyage policy' see PARA 222 ante.

2 Marine Insurance Act 1906 s 48. This section does not state whether or not there may be lawful excuses other than those mentioned in s 49 (see PARA 328 post); it may, therefore, still be necessary to refer to decided cases.

3 For the meanings of 'terminus a quo' and 'terminus ad quem' see PARA 321 ante.

4 *Chitty v Selwin and Martyn* (1742) 2 Atk 359; *Hartley v Buggin* (1781) 3 Doug KB 39; *Grant v King* (1802) 4 Esp 175; *Samuel v Royal Exchange Assurance Co* (1828) 8 B & C 119; *Mount v Larkins* (1831) 8 Bing 108; *Doyle v Powell* (1832) 4 B & Ad 267; *Hamilton v Sheddon* (1837) 3 M & W 49; cf *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498 at 504, HL. What is a reasonable time is a question of fact: see the Marine Insurance Act 1906 s 88; *Bain v Case* (1829) 3 C & P 496. *Phillips v Irving* (1844) 7 Man & G 325 lays down the principle that whether the delay at the port where the ship happens to be is reasonable or not must be determined not by any arbitrary rule but by the state of things existing at that port. The same principle was acted upon by Lord Ellenborough CJ in *Grant v King* supra; *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L Rep 75, HL (goods placed in store for eight months at port of shipment due to war conditions; held delay not unreasonable); *M Almojil Establishment v Malayan Motor and General Underwriters (Pte) Ltd, The Al-Jubail IV* [1982] 2 Lloyd's Rep 637, Sing CA (ship encountering heavy weather put into port where she was delayed for 79 days to complete non-essential repairs; held delay not unreasonable).

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328. Causes excusing deviation and delay.

There are certain causes which excuse a deviation or delay in prosecuting the voyage¹:

- 94 (1) Where authorised by any special term in the policy²; in this case the deviation or delay must not exceed what is permitted by the special terms in the policy, and the permission cannot be extended to objects not mentioned in the policy³.
- 95 (2) Where caused by circumstances beyond the control of the master and his employer⁴; in this case only a voluntary departure from the course of the insured voyage discharges the underwriter from further liability. Thus, if a master is obliged to go into a port of distress in order to repair his ship, or is compelled by the perils of the sea or by the violence of a mutinous crew to go out of the usual course, or where a ship is forcibly detained by a warship or is prevented by an embargo from landing, the deviation or delay is excused⁵.
- 96 (3) Where reasonably necessary in order to comply with an express or implied warranty⁶; this excuse is applicable where a ship is delayed in port for repairs necessary to make her seaworthy for the voyage, or where she is delayed at an intermediate port to make her seaworthy for the next stage of the voyage⁷.
- 97 (4) Where reasonably necessary for the safety of the ship or subject matter insured⁸; this excuse seems limited, except where the ship's safety is involved, to the case of a deviation or delay rendered necessary for the safety of the particular subject matter insured with the result that in the case of an insurance on cargo, freight⁹ or other interest deviation for the purpose of saving the ship would be excused¹⁰, but, in the case of an insurance on ship, deviation merely for the purpose of saving cargo or freight would not be excused. On the other hand, it is not limited to the necessity of saving the ship or the subject matter insured from some perils insured against¹¹.
- 98 (5) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger¹².
- 99 (6) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship¹³.
- 100 (7) Where caused by the barratrous conduct of the master or crew, if barratry is one of the perils insured against¹⁴.

1 Marine Insurance Act 1906 s 49(1). It seems doubtful whether s 49 was intended to enumerate all the causes which will excuse deviation or delay. Of course, if the ship insured under a voyage policy is unseaworthy at the time she sails because she is not sufficiently manned, equipped or furnished with supplies, the insurer will be discharged from liability whether or not there is a deviation, and the question of excuse cannot arise: see *Woolf v Claggett* (1800) 3 Esp 257; *O'Reilly v Royal Exchange Assurance* (1815) 4 Camp 246. As to seaworthiness see PARA 249 ante.

2 Marine Insurance Act 1906 s 49(1)(a).

3 *Doyle v Powell* (1832) 4 B & Ad 267; *Elliot v Wilson* (1776) 4 Bro Parl Cas 470, HL; *Syers v Bridge* (1780) 2 Doug KB 526; *Parr v Anderson* (1805) 6 East 202. The usual deviation clause, according to which the subject matter insured is held covered on payment of an additional premium, is, of course, a special term in the policy within the meaning of head (1) in the text.

4 Marine Insurance Act 1906 s 49(1)(b).

5 *Harrington v Halkeld* (1778) 2 Park's Marine Insurances (8th Edn) 639; *Driscoll v Bovil* (1798) 1 Bos & P 313; *Woolf v Claggett* (1800) 3 Esp 257; *Grant v King* (1802) 4 Esp 175; *Scott v Thompson* (1805) 1 Bos & PNR 181; *Phelps v Auldjo* (1809) 2 Camp 350; *Schroder v Thompson* (1817) 7 Taunt 462. Where the masters of German ships in the 1939-45 War obeyed the orders of the German government as to the disposition of their vessels, the movements of the vessels did not amount to deviations, as they were either 'caused by circumstances beyond the control of the master and his employer within the Marine Insurance Act 1906 s 49(1)(b), or 'reasonably necessary for the safety of the ship or subject matter insured' within s 49(1)(d) (see head (4) in the text): *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50, [1941] 3 All ER 62, HL.

6 Marine Insurance Act 1906 s 49(1)(c).

7 *Motteux v Governor & Co of London Assurance* (1739) 1 Atk 545 at 546; *Smith v Surridge* (1801) 4 Esp 25; *Bouillon v Lupton* (1863) 15 CBNS 113; and see *Phillips v Irving* (1844) 7 Man & G 325.

8 Marine Insurance Act 1906 s 49(1)(d).

9 For the meaning of 'freight' see PARA 296 ante.

10 It is also an excuse as between shipowner and cargo-owner: *The Teutonia* (1872) LR 4 PC 171; *The San Roman* (1873) LR 5 PC 301.

11 In this respect the Marine Insurance Act 1906 effected a change in the law as laid down in *O'Reilly v Royal Exchange Assurance* (1815) 4 Camp 246, but there the ship was unseaworthy when she sailed. As to what are the elements of reasonable necessity see *James Phelps & Co v Hill* [1891] 1 QB 605 at 612, CA, per Lindley LJ (bill of lading); *The Teutonia* (1872) LR 4 PC 171; *The San Roman* (1873) LR 5 PC 301 (apprehension of capture).

12 Marine Insurance Act 1906 s 49(1)(e). This does not excuse a deviation made solely for the purpose of saving property: *Scaramanga v Stamp* (1880) 5 CPD 295, CA.

13 Marine Insurance Act 1906 s 49(1)(f).

14 *Ibid* s 49(1)(g). For the meaning of 'barratry' see PARA 342 post. Deviation is not excused by the master's ignorance or want of skill, however gross it may be: *Vallejo v Wheeler* (1774) 1 Cowp 143; *Ross v Hunter* (1790) 4 Term Rep 33.

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329. Resumption of course.

When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch¹. This evidently does not mean that the ship must return to the actual spot where she turned aside, but that she must do her best to reach the terminus ad quem of the voyage².

¹ Marine Insurance Act 1906 s 49(2).

² *Harrington v Halkeld* (1778) 2 Park's Marine Insurances (8th Edn) 639; *Delany v Stoddart* (1785) 1 Term Rep 22. For the meaning of 'terminus ad quem' see PARA 321 ante.

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(7) PERILS INSURED AGAINST

(i) Losses for which Insurer Liable

A. IN GENERAL

330. Perils insured against.

The perils insured against will, of course, depend on which Institute Clauses are inserted in the policy¹.

Thus the Institute Cargo Clauses (A) cover all risks, subject to specified exceptions.

The Institute Cargo Clauses (B) cover, subject to specified exceptions, fire², explosion, stranding³, grounding, sinking or capsizing⁴, overturning or derailment of land conveyances, collision, discharge of cargo at a port of distress, earthquake, volcanic eruption or lightning, general average sacrifice⁵, jettison⁶ or washing overboard, entry of water, and loss or dropping of packages. The Institute Cargo Clauses (C) are in similar terms but the scope of the perils insured against is narrower.

The Institute Time Clauses (Hulls), the Institute Voyage Clauses (Hulls), the Institute Time Clauses (Freight) and the Institute Voyage Clauses (Freight) cover loss due to, inter alia: (1) perils of the seas⁷; (2) fire and explosion; (3) violent theft by persons outside the vessel; (4) jettison; (5) piracy⁸; (6) earthquake, volcanic eruption or lightning; (7) accidents in loading⁹; (8) bursting of boilers etc; (9) negligence; and (10) barratry¹⁰.

The clauses also contain a collision clause¹¹ affording cover where a vessel collides with another vessel and causes damage to her.

The Institute War Clauses (Cargo) and the Institute Strikes Clauses (Cargo), the Institute War and Strikes Clauses (Hulls--Time), the Institute War and Strikes Clauses (Hulls--Voyage), the Institute War and Strikes Clauses (Freight--Time) and the Institute War and Strikes Clauses (Freight--Voyage) may also be attached to the policy, and cover loss by strikes¹² and war¹³.

1 See PARA 225 text and note 7 ante.

2 See PARA 334 post.

3 See PARA 349 post.

4 See PARA 332 post.

5 See PARA 420 et seq post.

6 See PARA 341 post.

7 See PARA 332 post.

8 See PARA 340 post.

9 See PARA 344 post.

10 See PARA 342 post.

- 11 See PARA 345 et seq post.
- 12 See PARA 335 post.
- 13 See PARA 336 et seq post.

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331. Onus of proof.

The assured¹ must in every case show that the loss comes within the terms of his policy²; but where all risks are covered by the policy and not merely risks of a specified class or classes, he discharges the onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss³. Although in ordinary circumstances an insurer who wishes to rely on an exceptions clause must prove that the loss is due to an excepted peril, it is permissible for the parties to provide by contract that the assured must prove that the loss is not covered by the exception⁴.

If examination of the evidence leaves the court in doubt as to the real cause of the loss, the assured has failed to prove his case⁵.

1 As to the use of the term 'the assured' see PARA 216 note 1 ante.

2 See *Panamanian Oriental Steamship Corp v Wright* [1971] 2 All ER 1028, [1971] 1 WLR 822, CA.

3 *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 47, HL, per Lord Birkenhead; *Theodorou v Chester* [1951] 1 Lloyd's Rep 204 at 218-219, 238-239; *F W Berk & Co Ltd v Style* [1956] 1 QB 180 at 187, [1955] 3 All ER 625 at 631; see also *C T Bowring & Co Ltd v Amsterdam Insurance Co Ltd* (1930) 36 Ll L Rep 309 at 325. For a discussion of liability under an 'all risks' policy for loss caused by inherent vice see PARA 354 post.

4 *Levy v Assicurazioni Generali* [1940] AC 791 at 798, [1940] 3 All ER 427 at 429-430, PC, approving *Re Hooley Hill Rubber and Chemical Co and Royal Insurance Co Ltd* [1920] 1 KB 257, CA; see further PARAS 99, 111 ante.

5 *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 2 All ER 712, [1985] 1 WLR 948, HL, where it was held that the judge was not bound to choose between theories advanced by the insurer and the assured, but could dismiss the assured's claim as not having been proved on the balance of probabilities.

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B. PERILS OF THE SEAS

332. Meaning of 'perils of the seas'.

The term 'perils of the seas', as used in a marine policy, does not include every casualty which may happen to the subject matter of the insurance¹ on the sea; it must be a peril of or due to the sea. It does not, for instance, cover fire or capture at sea, or any loss proximately caused by insects², or the wilful scuttling of a ship³. Again, unless the policy otherwise provides, it will not cover damage done by the bursting of the air-chamber of a donkey-engine, owing to a valve being closed which ought to be kept open, with the result that water is forced up into the air-chamber and causes an explosion⁴.

Moreover, the purpose of a marine policy is to secure an indemnity against accidents which may happen, not against events which in the ordinary course of things must happen⁵. Therefore, in general, the term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas, and does not include the ordinary action of the winds and waves⁶.

However, where there is an accidental incursion of seawater into a vessel at a part of the vessel where, and in a manner in which, it is not expected to enter in the ordinary course of things, and there is consequent damage to goods insured, there is prima facie a loss by perils of the seas⁷, and if the cargo has been properly stowed, the insurer will not escape liability by proving that the weather was such as might reasonably have been anticipated, for it is the damage due to the weather and not the weather itself which provides the element of the fortuitous⁸. Loss caused by an action necessarily and reasonably taken to prevent a peril of the sea from affecting the insured goods is a loss due to perils of the seas⁹.

One of the most obvious cases of loss by perils of the seas is the foundering of the ship at sea, and where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed¹⁰. It is also presumed that the cause of loss is foundering at sea¹¹.

1 As to the subject matter of the insurance see PARA 217 ante.

2 *Schloss Bros v Stevens* [1906] 2 KB 665 at 670, CA, per Walton J; and see PARA 353 post.

3 *P Samuel & Co Ltd v Dumas* [1924] AC 431; and see PARA 355 post. The unintentional admission of seawater into a ship by which she is caused to sink is a peril of the sea: *Cohen, Sons & Co v National Benefit Assurance Co Ltd* (1924) 40 TLR 347. If the ship is scuttled by the shipowner's employees without his privity, this will be a loss by barratry: see PARA 342 post.

4 *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484, HL (the 'Inchmaree' case); cf *Oceanic Steamship Co v Faber* (1907) 13 Com Cas 28, CA; see also *Yuill & Co v Robson* [1907] 1 KB 685 (affd [1908] 1 KB 270, CA). This damage will be covered by the relevant Institute Clause: see the Institute Cargo Clauses (A) cl 1, the Institute Cargo Clauses (B) cl 1, the Institute Cargo Clauses (C) cl 1, the Institute Time Clauses (Hulls) cl 6, the Institute Voyage Clauses (Hulls) cl 4, the Institute Time Clauses (Freight) cl 7, and the Institute Voyage Clauses (Freight) cl 4; and PARA 330 ante.

5 *Wilson Sons & Co v Xantho (Cargo Owners)* (1887) 12 App Cas 503 at 509, HL, per Lord Herschell (a bill of lading case but one which has always been cited as an authority on the meaning of the words 'perils of the seas' in policies of marine insurance); see *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 68, [1940] 4 All ER 169 at 176, PC. See also *Merchants Trading Co v Universal Marine Insurance Co* (1870) 2 Asp MLC 431n, CA; *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484 at 492, 498, HL; *The Stranna* [1938] P 69, [1938] 1 All ER 458, CA; *Charles Goodfellow Lumber Sales*

Ltd v Verreault, Hovington and Verreault Navigation Inc [1971] 1 Lloyd's Rep 185, Can SC; *Seashore Marine SA v Phoenix Assurance plc* [2002] Lloyd's Rep IR 51.

6 Marine Insurance Act 1906 s 30(2), Sch 1 r 7; see *Magnus v Buttemer* (1852) 11 CB 876 at 881 per Jervis CJ; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 524, HL, per Lord Halsbury LC; and the judgment of Walton J in *Schloss Bros v Stevens* [1906] 2 KB 665, CA. See also *E D Sassoon & Co v Western Assurance Co* [1912] AC 561, PC (where damage to goods by water percolating through a leaky hulk was held not due to perils of the seas); and *Grant, Smith & Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1920] AC 162, PC (where the capsizing of a floating dock, owing to the unfitness of its structure for the work for which it was required, was held not to be a loss by perils of the sea). Contrast *Mountain v Whittle* [1921] 1 AC 615, HL (houseboat sank owing to entry of water through defective side seams while being towed; held loss due to perils of the sea). For a case where a loss, not proximately caused by perils of the seas, was recoverable as a loss by perils ejusdem generis to them, see *The Lapwing* [1940] P 112.

7 *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 68, [1940] 4 All ER 169 at 176, PC.

8 *N E Neter & Co Ltd v Licenses and General Insurance Co Ltd* [1944] 1 All ER 341, DC.

9 *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55, [1940] 4 All ER 169, PC.

10 Marine Insurance Act 1906 s 58.

11 *Green v Brown* (1743) 2 Stra 1199; *Newby v Read* (1761) Marshall on Marine Insurances (4th Edn) 388; *Koster v Reed* (1826) 6 B & C 19.

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333. Extraordinary violence of wind or waves not necessary.

Having regard to certain dicta to be found in some judgments and to the wording in the Marine Insurance Act 1906¹, it is important to notice that losses by perils of the seas² are not confined to those occasioned by extraordinary violence of the wind or waves, but include all losses proximately occasioned³ by fortuitous action of the wind and waves. Thus, perils of the seas include a loss by collision with another vessel, or by the ship striking on a sudden rock or other obstruction in fair weather⁴, or damage done to cargo by incursion of seawater through a hole in a pipe gnawed by rats⁵, or through a valve by mistake left open⁶, or through cowl ventilators⁷. The labouring of the ship in rough weather may be fortuitous even though that weather is expected⁸.

1 See the Marine Insurance Act 1906 s 30(2), Sch 1 r 7; and PARA 332 ante.

2 For the meaning of 'perils of the seas' see PARA 332 ante.

3 For the meaning of 'proximate cause of loss' see PARA 356 post.

4 See *William France, Fenwick & Co Ltd v North of England Protecting and Indemnity Association* [1917] 2 KB 522.

5 *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, HL; *Popham v St Petersburg Insurance Co* (1904) 10 Com Cas 31 (unusual obstruction by ice).

6 *Blackburn v Liverpool, Brazil and River Plate Steam Navigation Co* [1902] 1 KB 290; cf *Ajum Goolam Hossen & Co v Union Marine Insurance Co*, *Hajee Cassim Joosub v Ajum Goolam Hossen & Co* [1901] AC 362, PC.

7 *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 69, [1940] 4 All ER 169 at 176, PC; see also PARA 332 ante.

8 *N E Neter & Co v Licenses and General Insurance Co Ltd* [1944] 1 All ER 341, DC.

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C. LOSS BY FIRE, STRIKES, WAR RISKS, PIRATES, THIEVES, JETTISON OR BARRATRY

334. Fire.

Loss by fire covers fire caused by lightning, or by an enemy, or by the ship being burnt in order to prevent capture¹, or to prevent the spread of a contagious disease or the like²; and, where a loss of freight is due to steps taken in order to prevent a fire which, but for those steps, would have broken out and destroyed the cargo, the insurer is liable for that loss of freight³. Mere heating, which has not arrived at the stage of incandescence or ignition, is not within the specific word 'fire'⁴. There is no onus on the assured to show that the fire was caused otherwise than by his own act⁵.

1 *Gordon v Rimmington* (1807) 1 Camp 123.

2 *Gordon v Rimmington* (1807) 1 Camp 123 at 124n.

3 *The Knight of St Michael* [1898] P 30; and see *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 34 Com Cas 23, CA (insurers held liable for (1) damage to cargo by water used to prevent fire spreading; and (2) part of cargo thrown from quay into water for same object).

4 See *Tempus Shipping Co Ltd v Louis Dreyfus & Co Ltd* [1930] 1 KB 699 at 708; *The Knight of St Michael* [1898] P 30.

5 *Slattery v Mance* [1962] 1 QB 676, [1962] 1 All ER 525; *National Justice Compania Naviera SA v Prudential Assurance Co Ltd*, *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68; *Kiriacoulis Lines SA v Compagnie D'Assurances Maritime Aeriennes et Terrestres (CAMAT)*, *The Demetra K* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep 581, [2002] Lloyd's Rep IR 795.

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335. Strikes.

The Institute Strikes Clauses (Cargo)¹ cover loss or damage caused by strikers, locked-out workmen, or participants in labour disturbances, riots² or civil commotions³; and terrorists or persons acting from political motives.

The Institute War and Strikes Clauses (Hulls--Time)⁴, the Institute War and Strikes Clauses (Hulls--Voyage)⁵, the Institute War and Strikes Clauses (Freight--Time)⁶ and the Institute War and Strikes Clauses (Freight--Voyage)⁷ contain similar terms.

1 Ie the Institute Strikes Clauses (Cargo) cl 1. As to the Institute Clauses see PARA 330 ante.

2 For the meaning of 'riot' see PARA 596 post.

3 For the meaning of 'civil commotion' see PARA 597 post.

4 Ie the Institute War and Strikes Clauses (Hulls --Time) cl 1.4-1.5.

5 Ie the Institute War and Strikes Clauses (Hulls --Voyage) cl 1.4-1.5.

6 Ie the Institute War and Strikes Clauses (Freight --Time) cl 1.2.1-1.2.2.

7 Ie the Institute War and Strikes Clauses (Freight --Voyage) cl 1.2.1-1.2.2.

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336. War risks.

The Institute War Clauses (Cargo)¹ cover, subject to specified exceptions:

- 101 (1) war, civil war, revolution, rebellion, insurrection², civil strife or hostile acts by or against a belligerent power;
- 102 (2) actual or attempted capture, seizure, arrest, restraint or detainment arising from those risks, and their consequences; and
- 103 (3) derelict mines, torpedoes, bombs or other weapons.

The Institute War and Strikes Clauses (Hulls--Time)³, the Institute War and Strikes Clauses (Hulls--Voyage)⁴, the Institute War and Strikes Clauses (Freight--Time)⁵ and the Institute War and Strikes Clauses (Hulls--Voyage)⁶ are in similar terms.

1 Institute War Clauses (Cargo) cl 1. As to the Institute Clauses see PARA 330 ante.

2 'Insurrection' means, for insurance purposes, an organised and violent internal revolt within a country, the main object of which is to overthrow the country's government: *National Oil Co of Zimbabwe (Pte) Ltd v Sturge* [1991] 2 Lloyd's Rep 281.

3 Institute War and Strikes Clauses (Hulls-Time) cl 1.1-1.3.

4 Institute War and Strikes Clauses (Hulls-Voyage) cl 1.1-1.3.

5 Institute War and Strikes Clauses (Freight-Time) cl 1.1.1-1.1.3.

6 Institute War and Strikes Clauses (Hulls-Voyage) cl 1.1.1-1.1.3.

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337. Capture and seizure.

Capture is a taking by an enemy as prize in time of war with intent to deprive the owner of all property in the thing taken; and if a ship is seized for the purpose of being carried into a port for adjudication, and is afterwards condemned by the prize court, the seizure constitutes an actual total loss¹. Where the voyage is abandoned from fear of capture, the loss cannot be recovered as a loss by capture². Where, however, the voyage is abandoned by a British subject because its further prosecution would be illegal owing to a declaration of war by the United Kingdom, this is a loss not by attempting to avoid a peril, but by the actual operation of the peril and may be recovered³.

Seizure includes takings otherwise than by capture, for instance by revenue or sanitary officers of a foreign state⁴. Seizures include deprivation of possession, whether the seizure was lawful or unlawful, and whether by enemies or pirates⁵.

If a United Kingdom ship is for any reason arrested or seized by the United Kingdom government, or if she is detained in port by embargo imposed by the government, this is a detention within the meaning of the policy⁶. The distinction between a loss by capture or restraint and a loss by fear of capture or restraint is dealt with subsequently⁷.

1 *Andersen v Marten* [1908] AC 334, HL (where the ship was wrecked and became a total loss between the time of capture and condemnation); *Green v Emslie* (1794) Peake 212 (ship stranded but undamaged and captured while stranded). A policy effected before the commencement of hostilities which insures against capture does not cover loss by British capture: *Keller v Le Mesurier* (1803) 4 East 396; *Brandon v Curling* (1803) 4 East 410. See PARA 259 ante.

2 *Kacianoff v China Traders Insurance Co Ltd* [1914] 3 KB 1121, CA; *Becker, Gray & Co v London Assurance Corpn* [1918] AC 101, HL; see also *Nickels & Co v London and Provincial Marine and General Insurance Co Ltd* (1900) 6 Com Cas 15.

3 *Sanday & Co v British and Foreign Marine Insurance Co Ltd* [1915] 2 KB 781, CA; affd sub nom *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL; see PARA 362 text to note 6 post. The loss is a 'constructive total loss', as to which see PARA 468 et seq post. As to the criterion of constructive total loss by capture see *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922, CA; *Wilson Bros, Bobbin & Co v Green* (1915) 31 TLR 605, cited in PARA 468 note 6 post; and *Roura and Forgas v Townend* [1919] 1 KB 189, cited in PARA 458 note 6 post.

4 *Cory v Burr* (1883) 8 App Cas 393, HL; *Miller v Law Accident Insurance Co* [1903] 1 KB 712, CA; *St Paul Fire and Marine Insurance Co v Morice* (1906) 11 Com Cas 153; *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] 1 All ER (Comm) 481, HL; *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd* [2002] EWCA Civ 1605, [2002] 2 All ER (Comm) 1095; cf *Robinson Gold Mining Co v Alliance Insurance Co* [1904] AC 359, HL (in this case, in the Court of Appeal [1902] 2 KB 489 at 500, Collins MR was of opinion that the loss would also fall within the words 'all consequences of warlike operations'). As to barratry see PARA 342 post.

5 See *Goss v Withers* (1758) 2 Burr 683 at 694 per Lord Mansfield CJ; *Powell v Hyde* (1855) 5 E & B 607; *Lozano v Janson* (1859) 2 E & E 160 (unlawful seizure); *Kleinwort v Shepard* (1859) 1 E & E 447; *Dean v Hornby* (1854) 3 E & B 180 (pirates).

6 *Touteng v Hubbard* (1802) 3 Bos & P 291 at 302 per Lord Alvanley CJ; *Green v Young* (1702) 2 Ld Raym 840; *Hagedorn v Whitmore* (1816) 1 Stark 157. In *Lozano v Janson* (1859) 2 E & E 160 at 176 (see also *Aubert v Gray* (1862) 3 B & S 169 at 182, Ex Ch), it is intimated that the assured cannot recover in respect of a lawful arrest or detention by the United Kingdom government; it is submitted that this only means that if the property insured is liable to arrest or detention by the United Kingdom government on account of some illegal act of the assured, and is for that reason arrested or detained, the assured cannot recover. See also *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL, where it was held that a British merchant

could recover for a constructive total loss when the further prosecution of the insured voyage had been rendered illegal by a British declaration of war, although the goods insured were undamaged and he had not been deprived of possession of them; and see PARA 362 post. Cf *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184, where the assured was held entitled to recover for an actual total loss of freight on the ground that the performance of the charterparty had been rendered illegal by the outbreak of war.

7 See PARA 362 post. The precise imminence of peril which would make the restraint a present fact as contrasted with a future fear cannot be fixed by definition; the circumstances in each particular case must be considered: *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227 at 238, HL, per Lord Dunedin (restraint); and see *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086, CA. As to constructive total loss by capture see PARA 468 post.

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338. Burden of proof in war risk cases.

Where a vessel, which is insured under a policy excepting war risks, is missing in time of war, it appears that once the assured has proved a loss there is a presumption that this was caused by perils of the seas¹. This presumption may, however, be rebutted by the marine insurer showing that the balance of probabilities is in favour of a loss by war risks. The law on this question is far from clear. Where the policy insures against war risks only, the onus is on the assured to show that the loss was caused by those risks².

¹ *Macbeth & Co v King* (1916) 86 LJB 1004; *British and Burmese Steam Navigation Co Ltd v Liverpool and London War Risks Insurance Association Ltd and British Foreign Marine Insurance Co Ltd* (1917) 34 TLR 140; *General Steam Navigation Co Ltd v Commercial Union Assurance Co Ltd, General Steam Navigation Co Ltd v Janson* (1915) 31 TLR 630. See also *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78 (revsd on the facts *Munro, Brice & Co v Marten* [1920] 3 KB 94, CA (brief report)); and see *Re National Benefit Assurance Co Ltd* (1933) 45 Ll L Rep 147; *Compania Maritima of Barcelona v Wishart* (1918) 87 LJB 1027. For the meaning of 'perils of the seas' see PARA 332 ante.

² *Euterpe Steamship Co Ltd v North of England Protecting and Indemnity Association Ltd* (1917) 33 TLR 540; *Zachariessen v Importers and Exporters Marine Co Ltd* (1924) 29 Com Cas 202, CA ('against mine risks only, including missing').

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339. Arrests, restraints, detainments etc.

The words 'arrests, restraints, and detainments' refer to political or executive acts, and do not include a loss caused by riot or by ordinary judicial process¹. A restraint does not necessarily involve the use of actual physical force; any authoritative prohibition on the part of any governing power or the operation of any municipal law is sufficient². It is doubtful whether compliance with an ultra vires order of a government department unaccompanied by a threat of force is a loss by restraint³.

The essential distinction between capture and arrest is that capture is the forcible taking of the subject matter of insurance in time of war with a view of taking it as prize, whereas arrest is a temporary detention only, with a view of ultimately releasing it or repaying its value⁴.

1 Marine Insurance Act 1906 s 30(2), Sch 1 r 10; *Finlay v Liverpool and Great Western Steamship Co Ltd* (1870) 23 LT 251 (legal proceedings). As to the interpretation of an exemption clause excluding loss arising from arrest, restraint or detainment by reason of infringement of any customs regulations see *Panamanian Oriental Steamship Corp v Wright* [1971] 2 All ER 1028, [1971] 1 WLR 882, CA; *Sunport Shipping Ltd v Tryg Baltica International (UK) Ltd (formerly Colonia Baltica Insurance Ltd)* [2003] EWCA Civ 12, [2003] 1 All ER (Comm) 586, [2003] 1 Lloyd's Rep 138. See also *Handelsbanken ASA v Dandridge* [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39, [2002] 2 Lloyd's Rep 421 (trading regulations; time of termination of right of detention). Unless a different intention appears, 'riot' in the Marine Insurance Act 1906 Sch 1 r 10, in the application of that rule to any policy of insurance taking effect on or after 1 April 1987, must be construed in accordance with the Public Order Act 1986 s 1: s 10(2). See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 555.

2 *Miller v Law Accident Insurance Co* [1903] 1 KB 712, CA; *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL; *Fooks v Smith* [1924] 2 KB 508 at 512; cf *Mansell & Co v Hoade* (1903) 20 TLR 150; *St Paul Fire and Marine Insurance Co v Morice* (1906) 11 Com Cas 153 (destruction of cattle under local regulations is covered by the warranty). See also *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50, [1941] 2 All ER 62, HL; *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086, CA; *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 34 Com Cas 23, CA.

3 In *Russian Bank for Foreign Trade v Excess Insurance Co Ltd* [1918] 2 KB 123, Bailhache J held that it was not a restraint; the decision was affirmed without deciding this point [1919] 1 KB 39, CA, but Scrutton LJ inclined to the opposite view. Restraints may excuse non-delivery of cargo under a contract of carriage, and yet not cause a loss of cargo recoverable under a contract of insurance: see *Becker, Gray & Co v London Assurance Corp* [1918] AC 101 at 114, HL, per Lord Sumner. See also *Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd* [1941] 3 All ER 256 at 261-262.

4 Marshall on Marine Insurance (4th Edn) 394.

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340. Pirates and thieves.

The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore¹. Revolutionaries organising and carrying out an armed expedition against the government, however, are not pirates within the meaning of that term in the policy².

There is no reason to limit piracy to acts outside territorial waters³. If a vessel is, in the ordinary meaning of the phrase, 'at sea', or if the attack can be described as a 'maritime offence', then she is in a place where piracy can be committed⁴. Theft without force or threat of force is not piracy⁵. Clandestine thieves, who use or threaten violence in order to escape after the theft has been committed, do not give rise to a loss by piracy⁶.

The term 'thieves' in a policy does not cover clandestine theft or a theft committed by any of the ship's company, whether crew or passengers⁷. Robbery accompanied by violence and committed by strangers, and not by the crew, is a loss by thieves under the policy⁸.

1 Marine Insurance Act 1906 s 30(2), Sch 1 r 8; *Nesbitt v Lushington* (1792) 4 Term Rep 783 at 787; *Palmer v Naylor* (1854) 10 Exch 382, Ex Ch (emigrants piratically and feloniously murdered the captain and part of the crew and carried away the ship and the rest of the crew: it was held that this was an act of piracy and covered by the policy); cf *Kleinwort v Shepard* (1859) 1 E & E 447. The Public Order Act 1986 s 10(2) (see PARA 339 note 1 ante) applies to the term 'rioter' in the Marine Insurance Act 1906 Sch 1 r 8.

2 *Bolivia Republic v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, CA. Persons may be pirates according to international law if they commit acts which are otherwise piratical with a view to robbery even though the robbery itself is frustrated: *Re Piracy Jure Gentium* [1934] AC 586, PC. Although the term 'pirates' has not the same meaning as in international law, it would seem that this proposition is applicable to such a policy: *Bolivia Republic v Indemnity Mutual Marine Assurance Co Ltd* supra.

3 *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Andreas Lemos* [1983] QB 647 at 658, [1983] 1 All ER 590 at 598 per Staughton J.

4 *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Andreas Lemos* [1983] QB 647 at 658, [1983] 1 All ER 590 at 598 per Staughton J.

5 *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Andreas Lemos* [1983] QB 647 at 660, [1983] 1 All ER 590 at 599 per Staughton J.

6 *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Andreas Lemos* [1983] QB 647 at 660-661, [1983] 1 All ER 590 at 599-600 per Staughton J.

7 Marine Insurance Act 1906 Sch 1 r 9. See also *Nishina Trading Co Ltd v Chiyoda Fire & Marine Insurance Co Ltd* [1969] 2 QB 449, [1969] 2 All ER 776, CA, on the meanings of 'theft' and the rarer 'taking at sea' in a marine policy.

8 *Harford v Maynard* (1785) 1 Park's Marine Insurances (8th Edn) 36. If shipwrecked goods are plundered by wreckers on shore, this is a loss by perils of the seas (*Bondrett v Hentigg* (1816) Holt NP 149), and also, it seems, a loss by thieves. Violence in this connection is not confined to violence to a person; breaking open the doors of an unattended warehouse at night and stealing the goods will constitute theft within the meaning of a policy containing a transit clause. It may even be that where the policy contains such a clause the doctrine that only theft by violence is covered does not apply: *La Fabrique de Produits Chimiques SA v Large* [1923] 1 KB 203. As to the transit clause see PARA 306 ante.

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341. Jettison.

'Jettison' clearly includes the general average sacrifice¹ consisting of the throwing overboard of cargo in time of peril for the common safety, but there is little authority on whether the meaning of the term is wider than this and includes any throwing overboard not amounting to such a sacrifice².

¹ For the meaning of 'general average sacrifice' see PARA 420 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 605 et seq.

² In *Butler v Wildman* (1820) 3 B & Ald 398, where the master of a ship which was about to be captured threw overboard the insured dollars in order to prevent their falling into the enemy's hands, it was held that this was loss by jettison.

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342. Barratry.

'Barratry'¹ includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer², and this is so whether the master's act is induced by motive of benefit to himself, malice to the owners, or a disregard of those laws which it was his duty to obey and upon his observance of which his owners relied³.

Sailing out of port without paying port dues or in breach of an embargo, or wilful breach of blockade, in consequence of which the ship is seized or other loss is sustained, may be barratry⁴. If the ship is fraudulently run away with by the master or by members of the crew, this is barratry on their part⁵. Deviation for a fraudulent or criminal purpose may be barratrous⁶, but the commission of a crime is not an essential feature of barratry⁷.

Deviation, if barratrous, does not avoid the policy, if barratry is one of the perils insured against⁸.

Loss arising from the master's ignorance or incompetence, through a mistake as to the meaning of his instructions, or as to the best mode of carrying them into effect, does not amount to barratry⁹.

1 Barratry, in the sense in which the term is used here, is much broader than the former criminal offence of barratry (abolished by the Criminal Law Act 1967 s 13(1)(a)), but acts which are barratrous for the purpose of the policy may amount to other criminal offences or they may be equally barratrous without any crime having been committed: see the text and notes infra. For a meaning of 'barratry' given in an American case see *The Padre Island* [1971] 2 Lloyd's Rep 431 at 432, US Dist Ct, per Garza DJ.

2 Marine Insurance Act 1906 s 30(2), Sch 1 r 11. Thus, a wrongful refusal by the crew to discharge cargo is barratrous: *Compania Naviera Bachi v Henry Hosegood & Co Ltd* [1938] 2 All ER 189. The words in the definition 'or, as the case may be, the charterer' refer to cases in which the charterer is deemed to be owner for this purpose: see PARA 343 note 2 post.

3 *Earle v Rowcroft* (1806) 8 East 126 at 139; *Heyman v Parish* (1809) 2 Camp 149. 'Wilful default' within the Merchant Shipping Act 1854 s 299 (repealed) (non-observance of collision regulations; see now regulations made pursuant to the Merchant Shipping Act 1995 s 85(3)(k); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 715 et seq) is not necessarily barratry: *Grill v General Iron Screw Collier Co* (1868) LR 3 CP 476, Ex Ch.

4 *Stamma v Brown* (1742) 2 Stra 1173 at 1174 per Lee CJ; *Robertson v Ewer* (1786) 1 Term Rep 127, cited by Lord Ellenborough CJ in *Earle v Rowcroft* (1806) 8 East 126; *Goldschmidt v Whitmore* (1811) 3 Taunt 508; *Everth v Hannam* (1815) 6 Taunt 375. For further illustrations see *Moss v Byrom* (1795) 6 Term Rep 379 (cruising); *Havelock v Hancill* (1789) 3 Term Rep 277; *Pipon v Cope* (1808) 1 Camp 434 (smuggling); *Australasian Insurance Co v Jackson* (1875) 33 LT 286, PC (kidnapping).

5 *Falkner v Ritchie* (1814) 2 M & S 290; *Brown v Smith* (1813) 1 Dow 349, HL; *Dixon v Reid* (1822) 5 B & Ald 597; *Soares v Thornton* (1817) 7 Taunt 627; *Roscow v Corson* (1819) 8 Taunt 684; *Hibbert v Martin* (1808) 1 Camp 538 (barratry by master); *Toulmin v Inglis* (1808) 1 Camp 421; *Toulmin v Anderson* (1808) 1 Taunt 227; *Hucks v Thornton* (1815) Holt NP 30 (barratry of crew in conjunction with prisoners of war); *Marstrand Fishing Co Ltd v Beer* [1937] 1 All ER 158; *The Hai Hsuan* [1958] 1 Lloyd's Rep 351, US 4th Cir.

6 *Vallejo v Wheeler* (1774) 1 Cowp 143; *Ross v Hunter* (1790) 4 Term Rep 33. If the captain is compelled by the mutiny of the crew to deviate from his course, this is barratry on the part of the mariners: *Elton v Brogden* (1747) as reported in 2 Stra 1264; and see cases cited in note 5 supra.

7 *Compania Naviera Bachi v Henry Hosegood & Co Ltd* [1938] 2 All ER 189 at 194 per Porter J.

8 See PARA 328 ante.

9 *Phyn v Royal Exchange Assurance Co* (1798) 7 Term Rep 505; *Todd v Ritchie* (1816) 1 Stark 240; *Bottomley v Bovill* (1826) 5 B & C 210 at 212; *Bradford v Levy* (1825) Ry & M 331.

UPDATE

342 Barratry

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(i) Losses for which Insurer Liable/C. LOSS BY FIRE, STRIKES, WAR RISKS, PIRATES, THIEVES, JETTISON OR BARRATRY/343. Effect of consent by owners.

343. Effect of consent by owners.

No act can be barratrous which is sanctioned or authorised by those who are either the absolute owners of the ship¹ or may be considered her owners for the time being². Unless he can be so considered, the owner of insured goods cannot recover as for a loss by barratry in respect of any act of the master which is sanctioned by the owner of the ship³. The shipowner cannot recover for a loss by barratry in respect of acts done by the charterer's agents where the ship is demised to the charterer, and the latter thus becomes owner of the ship for the voyage⁴.

Loss by barratry seems to be an exception to the general rule of *causa proxima non remota spectatur*⁵, for if there has been barratrous conduct on the part of the master and crew, and the loss happens in consequence of it, the insurers are liable as for a loss by barratry although the proximate cause of the loss is a peril of the seas or other peril insured against⁶.

Once the assured has proved a casting away of the vessel by the deliberate act of the master or crew, it is for the insurers to prove that the assured consented to or connived at the casting away⁷.

1 *Vallejo v Wheeler* (1774) 1 Cowp 143; *Nutt v Bourdieu* (1786) 1 Term Rep 323; cf *Stamma v Brown* (1742) 2 Stra 1173; *Pipon v Cope* (1808) 1 Camp 434; *Everth v Hannam* (1815) 6 Taunt 375; *The Michael, Piermay Shipping Co SA v Chester* [1979] 2 Lloyd's Rep 1, CA. A master who is part owner may, however, be guilty of barratry as against his innocent co-owners (*Jones v Nicholson* (1854) 10 Exch 28), or against the mortgagee of his share (*Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 QB 311, CA). Where, however, the mortgagor is sole owner and is himself privy to the wrongful act which causes the loss, it seems that an innocent mortgagee, who has taken no part in the appointment of the guilty master or crew, cannot recover for a loss by barratry: see *P Samuel & Co Ltd v Dumas* [1924] AC 431 at 449, 454, HL; and see that case in the Court of Appeal [1923] 1 KB 592 at 622 per Scrutton LJ.

2 The question whether the charterer is in any particular case to be deemed for this purpose the owner of the ship depends upon the terms of the charterparty: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq. Freighters have been so regarded for purposes of barratry in *Vallejo v Wheeler* (1774) 1 Cowp 143; *Soares v Thornton* (1817) 7 Taunt 627; *Ionides v Pender* (1872) 1 Asp MLC 432. See, however, the comments of Hilbery J at first instance in *Forestal Land, Timber and Rlys Co Ltd v Rickards* [1940] 4 All ER 96 at 111-112 (revsd [1941] KB 225, [1940] 4 All ER 395, CA; affd [1942] AC 50, [1941] 3 All ER 62, HL). See also *Grauds v Dearsley* (1935) 51 Ll L Rep 203 (shipowner who allowed her husband to have possession and control of the ship could not treat his conduct as barratrous).

3 *Nutt v Bourdieu* (1786) 1 Term Rep 323; *Stamma v Brown* (1742) 2 Stra 1173; *Commercial Trading Co Inc v Hartford Fire Insurance Co* [1974] 1 Lloyd's Rep 179, US 5th Cir.

4 *Hobbs v Hannam* (1811) 3 Camp 93.

5 As to this rule see PARAS 356-357 post.

6 See the judgment in *Cory v Burr* (1881) 8 QBD 313; on appeal (1882) 9 QBD 463, CA; affd (1883) 8 App Cas 393, HL, where, however, at 398 Lord Blackburn expressed a contrary opinion, and at 404 Lord Bramwell expressed a doubt on this point. It is submitted, however, that Lord Blackburn's view cannot be reconciled with *Earle v Rowcroft* (1806) 8 East 126, and *Vallejo v Wheeler* (1774) 1 Cowp 143, and other cases. There are many cases in which a loss may be recovered from the insurers, either as a loss by barratry, or a loss by perils of the seas, and some of the decided cases, involving the question whether the loss was one by barratry or one by perils of the seas have become, on account of the present system of pleading, unimportant: *Heyman v Parish* (1809) 2 Camp 149; *Arcangelo v Thompson* (1811) 2 Camp 620; *Goldschmidt v Whitmore* (1811) 3 Taunt 508; *Everth v Hannam* (1815) 6 Taunt 375; *Walker v Maitland* (1821) 5 B & Ald 171; *Blyth v Shepherd* (1842) 9 M &

W 763. This note and the text are retained from the first edition of this work. In view, however, of the decision in *P Samuel & Co Ltd v Dumas* [1924] AC 431, it would seem that in the case supposed in the text the barratry must be regarded as the proximate cause of the loss, and the loss would not be recoverable as a loss by perils of the sea: see *Issaias v Marine Insurance Co Ltd* (1923) 15 Ll L Rep 186 at 193, CA, per Atkin LJ; see also *Republic of China, China Merchants Steam Navigation Co Ltd and United States of America v National Union Fire Insurance Co of Pittsburg, Pennsylvania and American International Underwriters* [1957] 1 Lloyd's Rep 428 at 443 (the appeal did not extend to the decision on proximate cause: *The Hai Hsuan* [1958] 1 Lloyd's Rep 351, US 4th Cir). For a discussion on proximate cause and the possibility of more than one proximate cause see PARA 357 post.

7 *N Michalos & Sons Maritime SA v Prudential Assurance Co Ltd, The Zinovia* [1984] 2 Lloyd's Rep 264 at 272 per Bingham J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(i) Losses for which Insurer Liable/D. OTHER PERILS AND LOSSES/344. Accidents in loading, bursting of boilers, breakage of shafts, negligence of master, etc.

D. OTHER PERILS AND LOSSES

344. Accidents in loading, bursting of boilers, breakage of shafts, negligence of master, etc.

It is now usual to include in policies a clause¹ expressly making the policy cover loss of or damage to the subject matter insured directly caused by accidents in loading or discharging cargo or fuel; explosions; breakdown of or accident to nuclear installations or reactors; bursting of boilers, breakage of shafts² or latent defects³; negligence of master⁴, officers, crew⁵, pilots or repairers; contact with aircraft, land conveyance, dock or harbour equipment or installation; earthquake, volcanic eruption or lightning; provided that such loss or damage has not resulted from want of due diligence⁶ by the assured, owners or managers⁷. Masters, officers, crew or pilots are not considered part owners for this purpose if they hold shares in the vessel⁸.

The Institute International Hulls Clauses, which came into effect on 1 November 2002, make a number of important changes. The cover relating to accidents in loading, discharging or shifting cargo and fuel has been extended to stores and parts. As regards the bursting of boilers and breaking of shafts clause, it is confirmed that underwriters are liable only for the cost of repairing damage caused by these events and not for the costs of putting right the defect⁹, but that such liability is now capped at the amount by which the cost of repairing the loss or damage caused by the latent defect exceeds the cost of correcting the latent defect. The insured is also permitted to insure separately against the costs of replacing any boiler which bursts or shaft which breaks and the cost of repairing any latent defect.

1 See the Institute Time Clauses (Hulls) cl 6. This part of the clause was at one time known as the 'Inchmaree' clause in consequence of the decision in *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484, HL; see also the Institute Voyage Clauses (Hulls) cl 4, the Institute Time Clauses (Freight) cl 5, and the Institute Voyage Clauses (Freight) cl 5, which are in the same terms. See also PARA 330 ante.

2 The clause does not provide insurance against breakage of the shaft itself as this damage is not 'caused by' breakage of the shaft: *Scindia Steamships (London) Ltd v London Assurance* [1937] 1 KB 639, [1937] 3 All ER 895. See also *Jackson v Mumford* (1902) 8 Com Cas 61 (affd on other grounds (1904) 9 Com Cas 114, CA); *Oceanic Steamship Co v Faber* (1906) 11 Com Cas 179 (affd (1907) 13 Com Cas 28, CA); *Hutchins Bros v Royal Exchange Assurance Corp* (1911) 27 TLR 217 (affd [1911] 2 KB 398, CA).

3 See *The Jomie* [1973] 2 Lloyd's Rep 489, US 5th Cir; *The Green Lion* [1974] 1 Lloyd's Rep 593, US Dist Ct; *Robert A Parente v Bayville Marine Inc and General Insurance Co of America* [1975] 1 Lloyd's Rep 333, US SC.

4 See *Lind v Mitchell* (1928) 98 LJB 120, CA; *The Lapwing* [1940] P 112.

5 See *F B Walker & Sons Inc v Valentine* [1970] 2 Lloyd's Rep 429, US 5th Cir; *The Belle of Portugal* [1970] 2 Lloyd's Rep 386, US 9th Cir.

6 See *The Pacific Queen* [1963] 2 Lloyd's Rep 201, US 9th Cir; *F B Walker & Sons Inc v Valentine* [1970] 2 Lloyd's Rep 429, US 5th Cir; *The Brentwood* [1973] 2 Lloyd's Rep 232, BC CA.

7 Institute Time Clauses (Hulls) cl 6; and see the other clauses mentioned in note 1 supra. The fact that the policy contains such a clause, which specifically covers loss caused by explosion, does not affect the burden of proof for the clause has been added only to include in the perils insured against events which have been construed not to be perils of the seas: *The Vainqueur* [1974] 2 Lloyd's Rep 398, US 2nd Cir.

- 8 Institute Time Clauses (Hulls) cl 6; and see the other clauses mentioned in note 1 *supra*.
- 9 See *Promet Engineering (Singapore) Pte Ltd v Sturge, The Nukila* [1997] 2 Lloyd's Rep 146.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(i) Losses for which Insurer Liable/E. THE COLLISION CLAUSE/345. Liability for collision in the absence of collision clause.

E. THE COLLISION CLAUSE

345. Liability for collision in the absence of collision clause.

Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss is in proportion to the degree in which each ship was in fault¹. If, in any such case, having regard to all the circumstances, it is not possible to establish different degrees of fault, the liability is apportioned equally². It has consequently become the custom for shipowners to protect themselves by a special clause in the policy called the 'collision' clause³.

1 Merchant Shipping Act 1995 s 187(1); see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 800 et seq.

2 Ibid s 187(2).

3 See the Institute Time Clauses (Hulls) cl 8; and the Institute Voyage Clauses (Hulls) cl 6. As to forms of collision clause for the protection from liability of cargo or freight owners see the Institute Cargo Clauses (A) cl 3; the Institute Cargo Clauses (B) cl 3; the Institute Cargo Clauses (C) cl 3; the Institute Time Clauses (Freight) cl 9; and the Institute Voyage Clauses (Freight) cl 6. As to the Institute Clauses see PARA 330 ante.

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346. Collision clause applies only to collision between ships.

The collision clause is usually expressed to be applicable in cases of collision between the ship insured and some other vessel¹. It therefore does not protect the shipowner against liability for his vessel running into a dock wall, breakwater or anything that is not another ship²; but, if there is a collision between A's tug and B, or if A strikes the anchor of B, this is a collision between two vessels within the meaning of the collision clause³. Moreover, where there has once been a collision within the meaning of the collision clause, the shipowner will, it seems, be protected against all damages, direct or consequential, occasioned by it which the owner of the other vessel or cargo may be entitled to recover from him⁴.

¹ See the Institute Time Clauses (Hulls) cl 8; and the Institute Voyage Clauses (Hulls) cl 6. See also PARA 345 note 3 ante.

² Eg fishing nets attached to a fishing vessel which was a mile away from the nets: *Bennett Steamship Co Ltd v Hull Mutual Steamship Protecting Society Ltd* [1913] 3 KB 372 (affd [1914] 3 KB 57, CA). This risk is, however, sometimes expressly included: *The Munroe* [1893] P 248; *Union Marine Insurance Co v Borwick* [1895] 2 QB 279; *Mancomunidad del Vapor Frumiz v Royal Exchange Assurance* [1927] 1 KB 567. A flying boat is not a 'vessel': *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] KB 161, [1943] 1 All ER 162. As to the meaning of 'ship' see also PARA 294 ante.

³ *The Niobe* [1891] AC 401, HL; *Re Margetts and Ocean Accident and Guarantee Corpn* [1901] 2 KB 792, DC; *Chandler v Blogg* [1898] 1 QB 32.

⁴ See *The North Britain* [1894] P 77 at 86, CA, per A L Smith LJ; *William France, Fenwick & Co Ltd v Merchants' Marine Insurance Co Ltd* [1915] 3 KB 290, CA (consecutive collisions). In *Burger v Indemnity Mutual Marine Assurance Co* [1900] 2 QB 348, CA, the insurers' liability was limited to 'payments in respect of injury to such other ship or vessel itself', and was held to exclude expenses of removing the wreck of the other vessel, paid by her owners, and recovered from the assured as damages. As to the proviso in the Institute Clauses (see note 1 supra), excluding liabilities for removal of obstructions, see *The North Britain* supra; *The Engineer* [1898] AC 382, HL; *Chapman v James Fisher & Sons* (1904) 20 TLR 319.

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347. Full protection policy.

The collision clause does not apply to every collision nor to every class of damage occasioned by it, nor does it usually purport to insure against more than three-fourths of the damage sustained¹. Thus, the assured is entitled to an indemnity under the clause only in respect of his liability to pay damages for acts of a tortious character² and cannot claim to be indemnified in respect of obligations arising from contract³ or from special legislation⁴. In order to protect themselves against what is not covered by the clause, shipowners often insure in mutual insurance associations⁵, or effect with insurers a 'full protection' policy⁶.

1 See the Institute Time Clauses (Hulls) cl 8; and the Institute Voyage Clauses (Hulls) cl 6. The Institute International Hulls Clauses 2002 repeat these provisions but allow the insured to purchase 4/4ths cover for an additional premium.

2 The act in respect of which damages are payable need not necessarily be a tort under English law: *Hall Bros Steamship Co Ltd v Young* [1939] 1 KB 748, [1939] 1 All ER 809, CA, explaining *Furness Withy & Co Ltd v Duder* [1936] 2 KB 461, [1936] 2 All ER 119.

3 *Furness Withy & Co Ltd v Duder* [1936] 2 KB 461, [1936] 2 All ER 119 (contract for towage by Admiralty tug providing that the shipowner should make good all damage suffered by the Admiralty).

4 *Hall Bros Steamship Co Ltd v Young* [1939] 1 KB 748, [1939] 1 All ER 809, CA.

5 As to mutual insurance associations see PARAS 517-522 post.

6 As to this see Gow's Marine Insurance (5th Edn) 261-262. For the construction of a policy indemnifying a shipowner against liability to a harbour authority in connection with the removal of a wreck see *Oceanic Steam Navigation Co Ltd v Evans* (1934) 51 TLR 67, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(ii) Losses for which Insurer not Liable/348. Losses for which insurer not liable.

(ii) Losses for which Insurer not Liable

348. Losses for which insurer not liable.

The Marine Insurance Act 1906 provides that the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against¹, even though the loss would not have happened but for the misconduct or negligence of the master or crew². Unless the policy otherwise provides, the insurer on ship³ or goods⁴ is not liable for any loss proximately caused by delay⁵, even though the delay is caused by a peril insured against⁶. Again, unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear⁷, ordinary leakage and breakage⁸, inherent vice⁹ or nature of the subject matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils¹⁰.

In addition the Institute Clauses contain the following exceptions to liability:

- 104 (1) a General Exclusions Clause (in the case of cargo), which exempts the insurer from liability for a number of the types of loss excluded under the Marine Insurance Act 1906, such as loss by the wilful misconduct of the assured, by delay or by inherent vice¹¹;
- 105 (2) a War Exclusion Clause, which states that the policy does not cover loss caused by war, civil war, insurrection, etc¹²;
- 106 (3) a Strikes Exclusion Clause, which states that the policy does not cover loss caused by strikes or persons taking part in riots or civil commotion, or by any terrorist¹³;
- 107 (4) a Malicious Acts Exclusion Clause, which excludes liability for loss arising from the detonation of an explosive, or from any weapon, caused by any person acting maliciously or from a political motive¹⁴; and
- 108 (5) a Nuclear Explosion Clause, which states that the policy does not cover loss arising from any weapon employing atomic or nuclear fission¹⁵.

1 As to the perils insured against see generally para 330 ante.

2 Marine Insurance Act 1906 s 55(2)(a). As to the relationship between s 55(2)(a) and s 78(4) (the duty of the assured and his agents to avert or minimise loss) see PARA 437 note 3 post.

3 'Ship' includes hovercraft: see PARA 294 ante.

4 For the meaning of 'goods' see PARA 295 ante.

5 See PARA 350 post.

6 Marine Insurance Act 1906 s 55(2)(b).

7 See PARA 351 post.

8 See PARA 352 post.

9 See PARAS 353-354 post.

10 Marine Insurance Act 1906 s 55(2)(c). For the meaning of 'maritime perils' see PARA 217 ante.

- 11 See eg the Institute Cargo Clauses (A) cl 4. As to the Institute Clauses see PARA 330 ante.
- 12 See eg the Institute Time Clauses (Hulls) cl 24. Separate clauses may cover war risks: see PARA 336 ante.
- 13 See eg the Institute Voyage Clauses (Hulls) cl 22. Separate clauses may cover risks associated with strikes, etc: see PARA 335 ante.
- 14 See eg the Institute Time Clauses (Freight) cl 19.
- 15 See eg the Institute Voyage Clauses (Freight) cl 17.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(ii) Losses for which Insurer not Liable/349. Stranding in the ordinary course of employment.

349. Stranding in the ordinary course of employment.

The insurer is not liable for damage done by stranding in the ordinary course of the ship's employment. If the ship takes the ground in the usual course of her voyage and without the intervention of any extraordinary casualty, this is mere wear and tear¹; to make the insurer liable there must be something fortuitous, accidental and not necessarily arising from the ordinary course of navigation². Moreover, a loss by stranding can only take place when the ship, if not on the seas, is at any rate waterborne³.

1 As to wear and tear see PARA 351 post.

2 *Magnus v Buttemer* (1852) 11 CB 876. The negligence of those in charge of the docking of a yacht in allowing her to sit on a dangerous bottom is a fortuitous circumstance entitling the assured to recover for a loss: *The Lapwing* [1940] P 112. A policy against liability for loss of a vessel by 'grounding or stranding' does not cover sinking to the ground in deep water: *Baker-Whiteley Coal Co v Marten* (1910) 26 TLR 314.

3 *Phillips v Barber* (1821) 5 B & Ald 161; *Thompson v Whitmore* (1810) 3 Taunt 227; *Rowcroft v Dunsmore* (1801) cited in *Thompson v Whitmore* supra at 228. These cases, however, are now of little importance, because they were decided under old rules of pleading.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(ii) Losses for which Insurer not Liable/350. Loss proximately caused by delay.

350. Loss proximately caused by delay.

As previously stated¹, unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay is caused by a peril insured against². From this it follows that the insurer is not liable for damage to perishable goods, even though that damage would not have arisen but for the prolongation of the voyage caused by a peril insured against. Similarly, the wages of the crew and expenses incurred and provisions consumed during detention, whether in a port of distress for repairs, or by embargo or restraint³, are not, in the absence of a stipulation to the contrary, recoverable as such from the insurer⁴, although they may be the basis of claims in respect of general average⁵.

1 See PARA 348 ante.

2 Marine Insurance Act 1906 s 55(2)(b), which embodies the principle laid down in *Taylor v Dunbar* (1869) LR 4 CP 206, and *Pink v Fleming* (1890) 25 QBD 396, CA. The latter case is explained in *Schloss Bros v Stevens* [1906] 2 KB 665, CA, where Walton J held that an insurance against 'all risks by land and by water' covered all losses of an accidental nature of whatever kind. See further *St Margaret's Trust Ltd v Navigators & General Insurance Co Ltd* (1949) 82 Ll L Rep 752 (gradual deterioration of vessels); *Federation Insurance Co of Canada v Coret Accessories Inc and Hirsh (t/a S A Hirsh & Co)* [1968] 2 Lloyd's Rep 109, Que Superior Ct, Dist of Montreal (delay in delivery of goods).

3 As to restraint see PARA 339 ante.

4 *Fletcher v Poole* (1769) 1 Park's Marine Insurances (8th Edn) 115; *Lateward v Curling* (1776) 1 Park's Marine Insurances (8th Edn) 288; *Eden v Poole* (1785) 1 Park's Marine Insurances (8th Edn) 117; *Robertson v Ewer* (1786) 1 Term Rep 127; cf *M'Carthy v Abel* (1804) 5 East 388; *Everth v Smith* (1814) 2 M & S 278 (policies on freight). See also *Wilson v Bank of Victoria* (1867) LR 2 QB 203 at 212.

5 As to general average see PARA 420 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(ii) Losses for which Insurer not Liable/351. Wear and tear.

351. Wear and tear.

Loss by wear and tear of a ship and her appurtenances¹ differs essentially from loss by perils of the seas² in that it is not due to any fortuitous casualty, but is the ordinary result of navigation. Thus, the parting of a rope or cable, the splitting of a sail in ordinary weather, damage done to the vessel's copper sheathing or to the cable and anchor in a place of usual anchorage and in no extraordinary circumstances of wind and weather, or decay of or damage to masts or spars in the ordinary service of the ship, are all cases of wear and tear for which the underwriter is not liable³.

Similarly, damage caused by the ship springing a leak is considered wear and tear, unless it is traceable to some fortuitous occurrence during the voyage⁴.

1 As to liability for loss by wear and tear see the Marine Insurance Act 1906 s 55(2)(c); and spara 348 ante. See also *Wilson, Sons & Co v Xantho (Cargo Owners)* (1887) 12 App Cas 503 at 509, HL, per Lord Herschell.

2 For the meaning of 'perils of the seas' see PARA 332 ante.

3 In order to avoid disputes as to wear and tear, average adjusters have by the rules of their association determined the circumstances in which damage to sails, rigging, etc, is to be considered wear and tear (see the Rules of Practice of the Association of Average Adjusters, rr D 3, D 4). The rules of practice are framed in accordance with what the average adjusters consider are the legal principles applicable to the subject, but if they are found at variance with legal principles, the rules of practice cannot prevail: see *Atwood v Sellar & Co* (1879) 4 QBD 342 at 363; and on appeal (1880) 5 QBD 286 at 288-289, CA. In *Harrison v Universal Marine Insurance Co* (1862) 3 F & F 190, a special jury found against the alleged custom not to pay for damage done to the hull below the water line except where the ship had taken the ground or had come into collision with some substance other than water. The finding led to the insertion of the 'metalling' clause: see McArthur's Contract of Marine Insurance (2nd Edn) 308-309.

4 See *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 523-524, HL, per Lord Halsbury LC; *Dudgeon v Pembroke* (1874) LR 9 QB 581 at 595 (affd (1877) 2 App Cas 284, HL); *Merchants Trading Co v Universal Marine Insurance Co* (1870) 2 Asp MLC 431n, CA, there cited by Blackburn J; see also *Wadsworth Lighterage and Coaling Co Ltd v Sea Insurance Co Ltd* (1929) 45 TLR 597, CA, where the insured barge sank through 'general debility', and it was held that the insurers were not liable, although the policy expressly covered 'sinking'; *Capital Coastal Shipping Corp'n and Bulk Towing Corp'n v Hartford Fire Insurance Co (United States of America, third party)*, *The Cristie* [1975] 2 Lloyd's Rep 100, Dist Ct, Eastern Dist Virginia. Contrast *Mountain v Whittle* [1921] 1 AC 615, HL, cited in PARA 332 note 6 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(ii) Losses for which Insurer not Liable/352. Leakage or breakage.

352. Leakage or breakage.

As regards leakage or breakage of goods¹, the insurers are liable when it is caused by the violent pitching or labouring of the ship², but are not liable for ordinary leakage and breakage such as usually occurs on every voyage unless the language of the policy shows that such ordinary leakage or breakage was intended to be covered³.

1 As to the general principle of liability for leakage or breakage see PARA 348 ante.

2 *Crofts v Marshall* (1836) 7 C & P 597.

3 In *Traders and General Insurance Association Ltd v Bankers and General Insurance Co Ltd* (1921) 38 TLR 94, Bailhache J expressed the opinion that the words 'to pay average, including the risks of leakage' covered leakage from any cause. See also *Phoenix Insurance Co of Hartford v De Monchy* (1929) 141 LT 439, HL.

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353. Inherent vice or nature of subject matter.

As regards the inherent vice or nature of the subject matter¹, unless the policy otherwise provides², the insurer is not liable for loss or damage that is not the consequence of some casualty which can properly be considered a peril of the seas³. He is, therefore, not liable for loss or damage arising solely from decay or deterioration of the subject matter insured, as when fruit becomes rotten or flour heats, not from external causes, but from internal decomposition; nor is he liable for spontaneous combustion generated by some chemical change in the thing insured, arising from its being put on board in a wet or otherwise damaged condition⁴, or for damage caused by inadequate packing of the goods⁵.

Where the insurance is on live animals, the insurers are not liable for losses solely attributable to death from natural causes, for they only undertake to indemnify against losses proximately caused by the immediate agency of the perils insured against⁶, and death from natural causes is not a peril insured against. Loss by mortality is, however, sometimes expressly included amongst the perils insured against⁷.

The exception of inherent vice applies to damage to the ship as well as to the goods. Thus, if a ship insured under a time policy⁸ starts on the voyage in an unseaworthy⁹ condition, and is by reason of that unseaworthiness, and not by the perils of the seas, obliged to put into a port for repair, the expenses of doing so cannot be recovered from the insurer, although there is no warranty of seaworthiness, even if the owner was not aware of the vessel being unseaworthy¹⁰. On the other hand, the insurers under a time policy will be liable if the perils of the seas are the proximate cause of the ship putting into port, or of her being lost, although this would not have occurred but for the ship's unseaworthiness, provided the assured was not privy to this¹¹.

1 As to the general principle of liability for the inherent vice or nature of the subject matter see PARA 348 ante.

2 See PARA 354 post.

3 For the meaning of 'perils of the seas' see PARA 332 ante.

4 *Boyd v Dubois* (1811) 3 Camp 133; *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122, HL; *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283, CA

5 *F W Berk & Co Ltd v Style* [1956] 1 QB 180, [1955] 3 All ER 625; *Gee and Garnham Ltd v Whittall* [1955] 2 Lloyd's Rep 562.

6 As to insurances on animals and the effect of the clause 'free of mortality and jettison' see generally *Tatham v Hodgson* (1796) 6 Term Rep 656; *Lawrence v Aberdein* (1821) 5 B & Ald 107 at 111; *Gabay v Lloyd* (1825) 3 B & C 793.

7 *Jacob v Gaviller* (1902) 7 Com Cas 116 (which see also as to the 'walking on shore' clause); *St Paul Fire and Marine Insurance Co v Morice* (1906) 11 Com Cas 153 (slaughter of bull in consequence of the existence of foot-and-mouth disease).

8 For the meaning of 'time policy' see PARA 222 ante.

9 For the meaning of 'seaworthiness' see PARA 248 ante.

10 *Fawcus v Sarsfield* (1856) 6 E & B 192 at 204; *Ballantyne v Mackinnon* [1896] 2 QB 455, CA. See also *E D Sassoon & Co v Western Assurance Co* [1912] AC 561, PC; *Grant, Smith & Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1920] AC 162, PC.

11 *Dudgeon v Pembroke* (1877) 2 App Cas 284 at 295, HL. If, however, with the assured's privity, the ship is sent to sea in an unseaworthy state, the underwriter is not liable for a loss attributable to unseaworthiness: see PARAS 255 note 4 ante, 358 post.

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353 Inherent vice or nature of subject matter

NOTE 4--*Noten*, cited, applied: *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2009] EWHC 637 (Comm), [2008] 2 All ER (Comm) 795 (affd: [2009] EWCA Civ 1398, [2010] 1 Lloyd's Rep 243, [2009] All ER (D) 192 (Dec)).

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354. Insurance against loss due to inherent vice.

It is possible by express provision in the policy to insure against a loss caused by inherent vice¹. Whether or not the express terms of the policy do in fact render the insurer liable for such a loss is a matter of construction. The mere fact that a policy is expressed to cover 'all risks'² does not render the insurer liable for loss due to inherent vice³. Where a policy contains an Institute Clause providing that the insurance is not to cover loss or damage caused by inherent vice, an assured wishing to insure against such a peril must either use specific words to that effect, or at least have the relevant part of the Institute Clause struck out⁴.

1 *E D Sassoon & Co Ltd v Yorkshire Insurance Co Ltd* (1923) 14 Ll L Rep 167 (affd 16 Ll L Rep 129 at 133, CA, per Atkin LJ); *Dodwell & Co Ltd v British Dominion General Insurance Co Ltd* (1918) [1955] 2 Lloyd's Rep 391n ('risks of leaking from any cause whatsoever'); *F W Berk & Co Ltd v Style* [1956] 1 QB 180 at 186, [1955] 3 All ER 625 at 630-631; *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546; *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122, HL.

2 As to 'all risks' policies see PARA 331 ante.

3 *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 57, HL, per Lord Sumner; *Pasquali & Co v Traders and General Insurance Association Ltd* (1921) 9 Ll L Rep 514; *Schloss Bros v Stevens* [1906] 2 KB 665 at 673, CA; see also *Wadsworth Lighterage and Coaling Co Ltd v Sea Insurance Co Ltd* (1929) 35 Com Cas 1, CA; contrast *Traders and General Insurance Association Ltd v Bankers and General Insurance Co Ltd* (1921) 38 TLR 94; *Phoenix Insurance Co of Hartford v De Monchy* (1929) 141 LT 439, HL; *London and Provincial Leather Processes Ltd v Hudson* [1939] 2 KB 724, [1939] 3 All ER 857.

4 *F W Berk & Co Ltd v Style* [1956] 1 QB 180 at 187, [1955] 3 All ER 625 at 631 (in the report of this case in [1955] 2 Lloyd's Rep 382 at 390, the word 'and' appears and not 'or' as in the other reports mentioned); see also *Biddle, Sawyer & Co Ltd v Peters* [1957] 2 Lloyd's Rep 339.

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355. Scuttling.

As the term 'perils of the seas'¹ refers only to fortuitous accidents or casualties, a loss by scuttling is not recoverable². When, therefore, the assured alleges a loss by perils of the sea he must, in order to make out a prima facie case, adduce evidence to show that the loss was due to a cause, such as sinking or stranding³, which, in the absence of design, would constitute a peril of the seas. If the assured makes out a prima facie case, the burden of disproving this rests on the insurer⁴. Where the court is left in doubt whether or not the vessel was scuttled, the assured must fail⁵.

1 For the meaning of 'perils of the seas' see PARA 332 ante.

2 *P Samuel & Co Ltd v Dumas* [1924] AC 431, HL. See the comments of Lord Sumner in *Anghelatos v Northern Assurance Co Ltd* (1924) 19 Ll L Rep 255 at 262, HL.

3 As to stranding in the ordinary course of employment see PARA 349 ante.

4 The precise extent of the burden which rests upon the insurer is not clear. Cf *Issaias v Marine Insurance Co Ltd* (1923) 15 Ll L Rep 186, CA, and *Anghelatos v Northern Assurance Co Ltd* (1923) 16 Ll L Rep 252, CA (affd on the facts (1924) 19 Ll L Rep 255, HL) ('beyond reasonable doubt'), with *Pateras v Royal Exchange Assurance* (1934) 49 Ll L Rep 400; *Maris v London Assurance* (1935) 51 Ll L Rep 158; see also *The Tropaioforos* [1960] 2 Lloyd's Rep 469; *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 All ER (Comm) 213, [2002] 2 Lloyd's Rep 88.

5 *Compañia Martiartu v Royal Exchange Assurance* [1923] 1 KB 650, CA (affd on the facts [1924] AC 850, HL); *Ansoleaga y Cia v Indemnity Mutual Marine Insurance Co Ltd* (1922) 13 Ll L Rep 231 at 248 per Scrutton LJ; *Anghelatos v Northern Assurance Co Ltd* (1923) 16 Ll L Rep 252, CA (affd (1924) 19 Ll L Rep 255, HL); *Banco de Barcelona v Union Marine Insurance Co Ltd* (1925) 30 Com Cas 316; *Grauds v Dearsley* (1935) 51 Ll L Rep 203; *Bank of Athens v Royal Exchange Assurance* (1937) 57 Ll L Rep 37 (affd 59 Ll L Rep 67, CA); *The Tropaioforos* [1960] 2 Lloyd's Rep 469; *The Gold Sky* [1972] 2 Lloyd's Rep 187; *N Michalos & Sons Maritime SA v Prudential Assurance Co Ltd, The Zinovia* [1984] 2 Lloyd's Rep 264; *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 2 All ER 712, [1985] 1 WLR 948, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(iii) Proximate Cause of Loss/A. DETERMINATION OF PROXIMATE CAUSE/356. Causation.

(iii) Proximate Cause of Loss

A. DETERMINATION OF PROXIMATE CAUSE

356. Causation.

It is a fundamental principle of marine insurance that *causa proxima non remota spectatur*¹, and that the underwriter is not liable for any loss which is not proximately caused by a peril insured against². This principle is embodied in the Marine Insurance Act 1906³, but certain decisions of the House of Lords have to some extent modified the previous application of the principle⁴. Subject to the provisions of that Act, and unless the policy otherwise provides⁵, the insurer is liable for any loss proximately caused by a peril insured against, but subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against⁶. For this purpose the word 'proximate' means proximate in efficiency, rather than proximate in time⁷. 'Proximate cause' in fact means the same thing as 'dominant' or 'effective' or 'direct' cause⁸.

1 le the immediate, not the remote cause, is to be considered.

2 As to perils insured against see generally para 330 ante.

3 See the Marine Insurance Act 1906 s 55(1); and the text and notes infra.

4 See the observations of Scrutton LJ in *British and Foreign Steamship Co Ltd v R* [1918] 2 KB 879 at 886, CA, and in *P Samuel & Co Ltd v Dumas* [1923] 1 KB 592 at 629, CA. The leading case before the Act was *Ionides v Universal Marine Insurance Co* (1863) 14 CBNS 259 (followed in *Marsden v City and County Assurance Co* (1865) LR 1 CP 232 (plate glass policy)). This case turned on the effect of the 'f c and s clause'. For the modern interpretation of the doctrine of proximate cause see *Becker, Gray & Co v London Assurance Corp* [1918] AC 101 at 112-118, HL, per Lord Sumner; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 363-364, HL, per Lord Dunedin.

5 In *Le Quellec et Fils v Thomson* (1916) 86 LJB 712, where the policy was 'against war risks, including extinction of lights', it was held that as the extinction of lights could never be the proximate cause of a loss, the policy had 'otherwise provided', within the meaning of the Marine Insurance Act 1906 s 55(1), but nevertheless the loss was not within the policy, because the master had not attempted to steer by the light, and would not have done so even if it had not been extinguished. Cf *Merchants' Marine Insurance Co Ltd v Liverpool Marine and General Insurance Co Ltd* (1928) 33 Com Cas 294, CA, where the policy provided that if the vessel was in a damaged condition at the expiration of the policy, the risk should continue for the immediate consequences of that damage, and it was held that the insurers were liable for the stranding of the vessel while on her way to a repair port after the policy had expired.

6 Marine Insurance Act 1906 s 55(1).

7 See *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 369, HL, per Lord Shaw, and at 363 per Lord Dunedin. See also *P Samuel & Co Ltd v Dumas* [1924] AC 431 at 447, HL, per Viscount Cave LC. This is contrary to the law as laid down in earlier cases; see *P Samuel & Co Ltd v Dumas* in [1923] 1 KB 592 at 619, CA, per Scrutton LJ. See also the cases cited in note 8 infra.

8 *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, HL, per Lord Sumner; *P Samuel & Co Ltd v Dumas* [1924] AC 431 at 459, HL, per Lord Finlay; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, HL, per Lord Dunedin; *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 71, [1940] 4 All ER 169 at 178, PC; *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, [1940] 3 All ER 405, HL; *Boiler Inspection and Insurance Co of Canada v Sherwin-Williams Co of Canada Ltd* [1951] AC 319, PC. See also *Ocean Steamship Co v Liverpool and London*

War Risks Insurance Association Ltd [1946] KB 561 at 575, [1946] 2 All ER 355 at 364, CA, per Scott LJ;
Ashworth v General Accident Fire and Life Assurance Corp'n Ltd [1955] IR 268. For earlier observations as to
causation and cases on causation in relation to insurance law see DAMAGES vol 12(1) (Reissue) PARAS 1035-1040.

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357. Determination of proximate cause.

The question whether a peril insured against was the proximate cause¹ of a loss is a question of fact 'to be determined on commonsense principles'², but certain rules may be deduced from the Marine Insurance Act 1906 as interpreted in the decided cases which the tribunal of fact ought to follow. It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss³.

If one of these causes is insured against under the policy, and none of the others is expressly excluded from the policy, the assured will be entitled to recover. If, however, one of these causes is excluded from the policy by a 'warranty'⁴, it becomes necessary to distinguish between the relative efficiency of the several causes, and if the most effective or dominant of the causes contributing to the loss is excluded by the warranty, the assured will not be entitled to recover. In other words, the first question in these cases is, was a peril insured against a proximate (that is, direct) cause of the loss? If it was, the next question is, was a peril excluded by the warranty also a proximate (that is, direct) cause of the loss? If this second question is answered in the affirmative, the final question arises, which of these causes was the more effective, or, in other words, the dominant cause of the loss⁵? The question whether the excluded peril was a proximate cause of the loss must be determined as if it arose under a policy insuring against the excluded peril⁶.

If the subject matter insured sustains damage by a peril insured against, but is afterwards totally lost by an excepted peril before the damage is made good, the assured cannot recover either for the damage or for the total loss⁷. Once the subject matter insured is lost to the assured by an excepted peril, he cannot recover on the policy even if it is subsequently destroyed by a peril insured against⁸.

Where no question arises as to an excepting warranty and the loss is proximately caused by a peril insured against, the assured is entitled to recover although the loss would not have happened but for other events, whether those events occurred before⁹ or after¹⁰ the peril insured against came into operation.

1 For the meaning of 'proximate cause' see PARA 356 ante.

2 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, HL, per Lord Dunedin, and see at 369 per Lord Shaw; *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997 at 1003-1004, [1940] 3 All ER 405 at 409-410, HL, per Lord Wright. See also *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691, [1942] 2 All ER 6, HL; *Boiler Inspection and Insurance Co of Canada v Sherwin-Williams Co of Canada Ltd* [1951] AC 319, PC; and Lord Sumner's warning against 'microscopic analysis of the circumstances of a casualty' in *The Clan Matheson* [1929] AC 514 at 530, HL.

3 See especially per Lindley LJ in *Reischer v Borwick* [1894] 2 QB 548 at 551-552, CA.

4 As to this use of the word 'warranty' see PARA 235 note 2 ante.

5 *Reischer v Borwick* [1894] 2 QB 548 at 551-552 per Lindley LJ; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 361-362, HL, per Lord Haldane, at 363 per Lord Dunedin, and at 369-371 per Lord Shaw of Dunfermline; *William France, Fenwick & Co Ltd v North of England Protecting and Indemnity Association* [1917] 2 KB 522; *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 71, [1940] 4 All ER 169 at 178, PC; *Athel Line Ltd v Liverpool and London War Risks Insurance Association Ltd* [1946] KB 117 at 122, [1945] 2 All ER 694 at 696-697, CA, per Lord Greene MR; *Ocean Steamship Co v Liverpool and London War Risks Insurance Association Ltd* [1946] KB 561 at 575, [1946] 2 All ER 355 at 364, CA (in which the text to this note, in an earlier edition of this work, was cited with approval by Scott

LJ); *Boiler Inspection and Insurance Co of Canada v Sherwin-Williams Co of Canada Ltd* [1951] AC 319 at 333-334, PC; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd, The Miss Jay Jay* [1987] 1 Lloyd's Rep 32, CA (in which Slade J also approved the text to this note); *Handelsbanken ASA v Dandridge* [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39, [2002] 2 Lloyd's Rep 421.

6 *Ionides v Universal Marine Insurance Co* (1863) 14 CBNS 259 at 285; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365, HL. No attempt seems to be made in the decided cases to define either the meaning of the 'substantive cause' (as distinct from the adjective 'proximate') or the standard by which the relative 'dominance' or 'effectiveness' of competing causes is to be measured. No doubt this is because 'the courts cannot act as metaphysical analysts': see *Harrisons Ltd v Shipping Controller* [1921] 1 KB 122 at 131 per McCardie J. Each tribunal of fact must therefore deal with these two matters in the light of common sense.

7 *Livie v Janson* (1810) 12 East 648.

8 *Andersen v Marten* [1908] AC 334, HL (loss by capture followed by shipwreck); contrast *Lobitos Oil Fields Ltd v Admiralty Comrs* (1918) 34 TLR 466, DC.

9 *Arcangelo v Thompson* (1811) 2 Camp 620; and see *Republic of China, China Merchants Steam Navigation Co Ltd and United States of America v National Union Fire Insurance Co of Pittsburgh, Pennsylvania and American International Underwriters Ltd* [1957] 1 Lloyd's Rep 428 at 443 (affd on another point sub nom *The Hai Hsuan* [1958] 1 Lloyd's Rep 351, US 4th Cir).

10 *Montoya v London Assurance Co* (1851) 6 Exch 451; *The Caroline* (1921) 37 TLR 617; *Lind v Mitchell* (1928) 98 LJKB 120, CA.

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NOTE 5--See also *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042, [2004] 2 Lloyd's Rep 604.

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B. ACTS, DEFAULTS OR ELECTION OF THE ASSURED OR HIS AGENTS: FRUSTRATION

358. Wilful misconduct or negligence.

The insurer is not liable for any loss attributable to wilful misconduct on the part of the assured, but unless the policy otherwise provides, he is liable for any loss proximately caused¹ by a peril insured against, and is liable even though the loss would not have happened but for the misconduct or negligence of the master or crew². The same result follows when the negligence of any other person (including the assured himself)³ contributes to the loss⁴.

1 For the meaning of 'proximate cause' see PARA 356 ante.

2 Marine Insurance Act 1906 s 55(2)(a). It appears to follow from the language of that provision that wilful misconduct by the assured will prevent him from recovering, in all cases in which misconduct has contributed to the loss, even though it is not so closely connected with the loss as to be its proximate cause: see *Britain Steamship Co v R* [1921] 1 AC 99 at 132, HL, per Lord Sumner.

3 *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114, CA.

4 *Thompson v Hopper* (1858) E B & E 1038, Ex Ch; *Davidson v Burnand* (1868) LR 4 CP 117; *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114, CA; *A-G v Adelaide Steamship Co Ltd* [1923] AC 292, HL; *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534, HL. The Marine Insurance Act 1906 s 78(4), which provides that it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss, only imposes a duty to sue and labour, and does not affect the assured's right to recover for a loss to which the negligence of himself or his agents has contributed: *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 65, HL; *Lind v Mitchell* (1928) 98 LJB 120, CA; *Netherlands (Represented by the Minister of Defence) v Youell and Hayward* [1998] 1 Lloyd's Rep 236, CA. It does not necessarily follow that in the absence of instructions from the owners, the master of a vessel must be taken to be included within the words 'the assured and his agents' in the Marine Insurance Act 1906 s 78(4), so that a failure by the master to take such measures as are reasonable will militate against the owners' claim against the insurers; the words 'his agents' should be read as inapplicable to the master or crew unless expressly instructed by the assured as to what to do or not to do in respect of suing and labouring; a possible exception not covered is the case of a master/owner: *The Gold Sky* [1972] 2 Lloyd's Rep 187 at 221 per Mocatta J; cf *Netherlands (Represented by the Minister of Defence) v Youell and Hayward* supra at 245 per Phillips LJ. As to suing and labouring see further PARAS 435-438 post.

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359. Wilful misconduct: unseaworthiness.

With regard to the wilful misconduct of the assured, it should be remembered that, in addition to the general provision exempting the insurer from liability for loss attributable to that misconduct¹, there is a special provision to the effect that where, with the assured's privity, a vessel insured under a time policy² is sent to sea in an unseaworthy³ condition, the insurer is not liable for any loss attributable to unseaworthiness⁴. It should also be borne in mind that the defence that the loss falls within either of these provisions is available against an innocent assignee of the policy⁵.

1 See PARA 358 ante.

2 For the meaning of 'time policy' see PARA 222 ante.

3 For the meaning of 'seaworthiness' see PARA 248 ante.

4 Marine Insurance Act 1906 s 39(5); and see PARAS 255, 353 ante, and the cases there cited. If the policy was a voyage policy (see PARA 222 ante), the assured would be precluded from recovering in all cases where the ship was unseaworthy at the commencement of the voyage. At one time it was held that in all questions arising between the subjects of different states, each is a party to the public acts of his own government, and that therefore an assured could not recover in respect of a capture, arrest or embargo by his own government: *Conway v Gray*, *Conway v Forbes*, *Maury v Sheddon* (1809) 10 East 536 at 545. The contrary has now been decided: see *Aubert v Gray* (1862) 3 B & S 169, Ex Ch. See also *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, HL. As to British capture see PARA 259 ante.

5 See PARA 389 note 9 post.

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360. Other persons' misconduct.

With regard to the misconduct of persons other than the assured, the insurer is liable for a loss which would not have occurred but for the misconduct (wilful or otherwise)¹ of the master or crew (or any other person), provided the loss was proximately caused² by a peril insured against³. Where, however, the assured seeks to recover for a loss alleged to be by perils of the seas⁴, and it appears that the loss was the result of wilful misconduct (as opposed to negligence), and that the misconduct is perpetrated, whether by the master or crew or any other person, with the object of bringing about the loss, the misconduct must be regarded as the proximate cause of the loss even though the means employed, for example stranding or sinking, are in themselves (that is, when they operate fortuitously) perils of the seas. In these cases the loss is not proximately caused by perils of the seas, and the insurer is only liable for the loss if the wilful act or omission in question is expressly insured against, for example, under the head of barratry, piracy etc⁵.

1 *Lind v Mitchell* (1928) 98 LJKB 120, CA. An owner or master who proceeds with his contract voyage in time of war is not guilty of wilful misconduct simply because there is a risk of capture: see *Papadimitriou v Henderson* [1939] 3 All ER 908.

2 For the meaning of 'proximate cause' see PARA 356 ante.

3 See PARA 358 ante.

4 For the meaning of 'perils of the seas' see PARA 332 ante.

5 See *P Samuel & Co Ltd v Dumas* [1924] AC 431, HL, overruling *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 QB 311, CA. As to a mortgagee's right to recover for a loss by barratry see PARA 343 note 1 ante. Logically the same result appears to follow when the act or omission, although intentional, is not blameworthy. See Lord Sumner's dissenting opinion in *P Samuel & Co Ltd v Dumas* supra at 473. It may be, however, that in these cases, if the act is done for the purpose of avoiding some disaster it should not be regarded as wilful: see the cases cited in PARAS 334 notes 1-4 ante, 361 note 3 post. See also *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL, cited in PARA 337 note 6 ante. It is not clear whether the principle laid down in *P Samuel & Co Ltd v Dumas* supra would be applied in cases in which the loss was alleged to be by a peril other than a peril of the seas, eg fire.

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361. Sale or hypothecation for repairs.

It follows from the principle that the insurer is not liable for a loss which is not proximately caused¹ by a peril insured against, that he is not liable for a loss proximately caused by the act or election of the assured or his agents. Thus, a loss on sale of goods to defray expenses of repair in a port of distress is not a loss by perils of the seas², nor is a loss by hypothecation of cargo for the purposes of the ship, because in these cases the loss is proximately occasioned not by the perils insured against, but by the shipowner being in want of funds³.

1 For the meaning of 'proximate cause' see PARA 356 ante.

2 *Powell v Gudgeon* (1816) 5 M & S 431; *Sarquy v Hobson* (1827) 4 Bing 131, Ex Ch. For the meaning of 'perils of the seas' see PARA 332 ante.

3 *Greer v Poole* (1880) 5 QBD 272.

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362. Interdiction of trade or blockade.

For similar reasons, neither compliance with an interdiction of commerce with the port of destination¹ nor abandonment of the adventure in consequence of the blockade of that port², or of an embargo imposed there³, or of the imminent danger of capture or seizure⁴, constitutes a risk for which insurers of an English policy on ship or goods are liable. Although these causes prevent the completion of the insured voyage, the loss of voyage and the expenses thereby occasioned are not considered to be caused by an 'arrest, restraint, and detainment', because they do not act directly and immediately, but only circuitously, on the subject matter insured⁵.

On the other hand, where an insured voyage is interrupted directly and immediately by the act or intervention of a government, so that if the insured goods are thereby prevented from being forwarded to their ultimate destination, and the detention appears likely to last for an indefinite time, the assured will be entitled to recover for a constructive total loss of the property. This is because a voyage policy on goods is regarded as an insurance not merely of the goods themselves but also of the 'contemplated adventure', that is the safe arrival of the goods at the destination named in the policy⁶.

1 *Hadkinson v Robinson* (1803) 3 Bos & P 388.

2 *Lubbock v Rowcroft* (1803) 5 Esp 50.

3 *Forster v Christie* (1809) 11 East 205; *Blackenhagen v London Assurance Co* (1808) 1 Camp 454.

4 *Nickels & Co v London and Provincial Marine and General Insurance Co* (1900) 6 Com Cas 15; cf *Parkin v Tunno* (1809) 11 East 22; *Kacianoff v China Traders Insurance Co Ltd* [1914] 3 KB 1121, CA; *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, HL. On the general principle see also *Halhead v Young* (1856) 6 E & B 312.

5 This legal principle may of course, like all rules of construction, be avoided by express stipulation in the policy. An insurance on a ship is a contract of indemnity against the loss of or damage to the ship herself, and does not indemnify against expenses proximately occasioned by reason of damage done to cargo: see the judgments in *Field Steamship Co v Burr* [1899] 1 QB 579, CA; applied in *Polurrian Steamship Co Ltd v Young* (1913) 19 Com Cas 143 at 159 (affd without dealing with this point [1915] 1 KB 922, CA).

6 *Rodoconachi v Elliott* (1874) LR 9 CP 518, Ex Ch; *Miller v Law Accident Insurance Co* [1903] 1 KB 712, CA; see also *The Knight of St Michael* [1898] P 30. This rule has not been altered by the Marine Insurance Act 1906: see *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL. See, however, the frustration clause discussed in PARA 363 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(iii) Proximate Cause of Loss/B. ACTS, DEFAULTS OR ELECTION OF THE ASSURED OR HIS AGENTS: FRUSTRATION/363. The frustration clause.

363. The frustration clause.

A clause, known as the frustration clause, is usually inserted in policies, providing that the policy excludes any claim based upon loss of or frustration of any insured voyage or adventure¹. The clause protects only against claims based on loss of the insured voyage relating to the goods and does not protect against claims for loss of the goods themselves².

¹ See eg the Institute War and Strikes Clauses (Freight--Time) cl 4.6; Institute War and Strikes Clauses (Freight--Voyage) cl 4.6. As to those clauses see PARA 330 ante. See further *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50, [1941] 3 All ER 62, HL; *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086, CA.

² *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50, [1941] 3 All ER 62, HL. The Law Reform (Frustrated Contracts) Act 1943 does not apply to contracts of insurance except as provided by s 1(5): see s 2(5)(b); and CONTRACT vol 9(1) (Reissue) PARA 919.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(7) PERILS INSURED AGAINST/(iii) Proximate Cause of Loss/B. ACTS, DEFAULTS OR ELECTION OF THE ASSURED OR HIS AGENTS: FRUSTRATION/364. Loss of freight by act or election of assured.

364. Loss of freight by act or election of assured.

Where the loss of freight¹ is due to the ship being abandoned by the assured to the insurer of the ship after a constructive total loss, this is deemed to be a loss occasioned by the act and election of the assured and not by a peril of the seas² and the loss is, therefore, not recoverable in a freight policy in the absence of a special provision³.

Again, where there is a charterparty by which the ship is chartered on monthly hire, and there is a loss of freight owing to the exercise by the charterer of special rights under the charterparty, the loss is considered as caused by the charterer's act and not proximately by a peril of the seas, and the underwriter is not liable for it⁴. Similarly, if the charterparty is for a lump freight, payable on delivery of the cargo, in cash, the insurer will not be liable to the shipowner for loss of freight if that was really occasioned not by the perils insured against, but by reason of the master having signed bills of lading which did not reserve a general lien on each portion of the cargo for the whole lump freight⁵.

This principle does not apply to a case where the charterparty provides that freight, apart from election by the charterer, is automatically to cease to be earned, for in that case the loss is considered to be proximately caused⁶ by the perils insured against⁷.

1 For the meaning of 'freight' see PARA 296 ante.

2 For the meaning of 'perils of the seas' see PARA 332 ante.

3 *M'Carthy v Abel* (1804) 5 East 388; *Scottish Marine Insurance Co of Glasgow v Turner* (1853) 1 Macq 334, HL; and cf *Mordy v Jones* (1825) 4 B & C 394; *Philpott v Swann* (1861) 11 CBNS 270. It is now commonly provided in freight policies that the amount insured is to be paid in full in the event of the total loss, whether actual or constructive, of the vessel: see Institute Time Clauses (Freight) cl 16.1, and Institute Voyage Clauses (Freight) cl 12.1 (and see PARA 330 ante). The freight policy and the hull policy are separate contracts, and the mere fact that there is a constructive total loss of the ship does not of itself entitle the assured to recover under this clause, as there may be circumstances in which, although the assured receives no freight, the freight has not been lost, as, for instance, where it is received by the hull insurer to whom the vessel has been abandoned: *Scottish Marine Insurance Co of Glasgow v Turner* supra; and see *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291 at 303, CA, per Lord Wright MR. The giving of notice of abandonment of the vessel is not essential to recovery under this clause provided that the vessel is in fact a constructive total loss: *Robertson v Petros M Nomikos Ltd* [1939] AC 371, [1939] 2 All ER 723, HL. As to constructive total loss and abandonment see PARAS 468-469 post.

4 *Inman Steamship Co v Bischoff* (1882) 7 App Cas 670, HL; *Manchester Liners v British and Foreign Marine Insurance Co Ltd* (1901) 7 Com Cas 26; cf *Mercantile Steamship Co Ltd v Tyser* (1881) 7 QBD 73.

5 *Williams & Co v Canton Insurance Office Ltd* [1901] AC 462, HL.

6 For the meaning of 'proximate cause' see PARA 356 ante.

7 *The Bedouin* [1894] P 1, CA, following and approving *The Alps* [1893] P 109. See also *Re Jamieson and Newcastle Steamship Freight Insurance Association* [1895] 2 QB 90, CA; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125, Ex Ch. The second point in *Mercantile Steamship Co Ltd v Tyser* (1881) 7 QBD 73, seems overruled by *The Bedouin* supra.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(i) Description of the Assured in the Policy/365. Description of the assured or his agent.

(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE

(i) Description of the Assured in the Policy

365. Description of the assured or his agent.

A marine policy must specify the name of the assured or some person who effects the insurance on his behalf¹.

The policy may be effected in the name either of the assured, or of the broker, or of an agent of the assured whether or not he employs a broker. The broker or agent need not, however, be described in the policy as broker or agent, and the action on the policy may be brought either in the name of the assured or in that of the broker or agent².

¹ Marine Insurance Act 1906 s 23(1).

² *Wolff v Horncastle* (1798) 1 Bos & P 316; *Bell v Gibson* (1798) 1 Bos & P 345; *De Vignier v Swanson* (1798) 1 Bos & P 346n; *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/366. Meaning of 'insurable interest'.

(ii) Insurable Interest

A. MEANING; NATURE OF INTEREST

366. Meaning of 'insurable interest'.

The Marine Insurance Act 1906 does not profess to give an exhaustive definition of insurable interest¹, but, subject to the provisions of the Act, every person has an insurable interest who is interested in a marine adventure². In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk in it, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or damage to it, or by the detention of it, or may incur liability in respect of it³.

A person may be said to be interested in an event when, if the event happens, he will gain an advantage, and, if it is frustrated, he will suffer a loss⁴, and it may be stated as a general principle that to constitute an insurable interest it must be an interest such that the peril would by its proximate effect cause damage to the assured⁵, that is to say cause him to lose a benefit or incur a liability⁶.

1 In a celebrated judgment Lawrence J explained in the following words the nature of an insurable interest: 'A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it;... and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concerning the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so effected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction': *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 302, HL. See also *Barclay v Cousins* (1802) 2 East 544; *Macaurea v Northern Assurance Co Ltd* [1925] AC 619 at 627, HL.

2 Marine Insurance Act 1906 s 5(1). For the meaning of 'marine adventure' see PARA 217 ante.

3 Ibid s 5(2). The assured has an insurable interest in the charges of any insurance which he may effect: s 13.

4 *Wilson v Jones* (1867) LR 2 Exch 139 at 150-151, Ex Ch, per Blackburn J.

5 As to the use of the term 'the assured' see PARA 216 note 1 ante.

6 *Seagrave v Union Marine Insurance Co* (1866) LR 1 CP 305 at 320 per Willes J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/367. Interest in possession not necessary.

367. Interest in possession not necessary.

A vested interest in possession is not necessary to constitute an insurable interest. An expectancy coupled with the present existing title to that out of which the expectancy arises is an insurable interest. Thus, freight payable either on the arrival of the goods or under a charterparty is insurable by the shipowner¹, but the expectation of benefit to arise from some subject in which the party insuring is not actually interested, but only expects to be interested, is not an insurable interest. Thus, the expectation of commission, or of profit to arise out of the sale of goods not contracted for at the time of their loss, is not an insurable interest under a policy².

¹ See PARAS 374-376 post.

² *Stockdale v Dunlop* (1840) 6 M & W 224; cf *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 323, HL; and see the judgment of Walton J in *Moran, Galloway & Co v Uzielli* [1905] 2 KB 555, where the plaintiffs had lent a sum of money to the owners of a foreign ship for disbursements. By instituting an action in rem they could, except for the loss of the ship, have acquired a lien on her, and therefore it was held that they had an insurable interest in the ship to the extent of the unsatisfied balance of their advances. This decision was explained in *Macauley v Northern Assurance Co Ltd* [1925] AC 619 at 626, HL, where it was held that an unsecured creditor of a limited company who also owned all the shares in the company, either personally or through nominees, had no insurable interest in the company's assets.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/368. Partial interest.

368. Partial interest.

A partial interest of any nature is insurable¹. Thus, an undivided or hotchpot interest in the subject matter insured, such as the interest of a part owner, whether a joint tenant or a tenant in common, is insurable². Similarly, a portion only of the freight at risk on a particular voyage may be insured³.

1 Marine Insurance Act 1906 s 8.

2 *Robertson v Hamilton* (1811) 14 East 522; *Inglis v Stock* (1885) 10 App Cas 263 at 274, HL.

3 *Griffiths v Bramley-Moore* (1878) 4 QBD 70, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/369. Defeasible interest.

369. Defeasible interest.

A defeasible interest is insurable¹. For instance, the right of captors to their prize under the Naval Prize Act 1864 is an insurable interest before condemnation, even though defeasible by the release of the Crown or by a sentence of restoration².

Where a person who has contracted for the purchase of goods has insured them, he has an insurable interest notwithstanding that he might, at his election, have rejected the goods or treated them as at the seller's risk, by reason of the seller's delay in making delivery or otherwise³.

¹ Marine Insurance Act 1906 s 7(1).

² *Stirling v Vaughan* (1809) 11 East 619, distinguishing *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 323, HL; and see the cases cited in PARA 381 note 1 post; and PRIZE.

³ Marine Insurance Act 1906 s 7(2); *Sparkes v Marshall* (1836) 2 Bing NC 761; *Anderson v Morice* (1876) 1 App Cas 713 at 727, 735, HL (approved in *Inglis v Stock* (1885) 10 App Cas 263 at 274, HL; explained in *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128 at 136, PC).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/370. Contingent interest.

370. Contingent interest.

A contingent interest is insurable¹. For instance, a carrier or other bailee who may become liable to the bailor for the loss of goods by the perils insured against has an insurable interest². Similarly, any liability to a third party which may be incurred by the owner of property by reason of maritime perils³ constitutes an insurable interest⁴.

A shipowner who has entered into recognisances in the Admiralty Court to pay the salvors of ship and cargo has a lien on, and therefore an insurable interest in, the cargo for the contribution due to him from its owner⁵.

The purchaser of a vessel abroad which is to remain at seller's risk until delivery in England probably has an insurable contingent interest in her arrival, though he has no insurable interest in the vessel herself until delivery⁶.

1 Marine Insurance Act 1906 s 7(1).

2 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 16.

3 For the meaning of 'maritime perils' see PARA 217 ante.

4 Marine Insurance Act 1906 ss 3(2)(c), 5; *Crowley v Cohen* (1832) 3 B & Ad 478; *Joyce v Kennard* (1871) LR 7 QB 78; *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18; *Hill v Scott* [1895] 2 QB 713, CA. See also *Mackenzie v Whitworth* (1875) 1 Ex D 36, CA (reinsurance by underwriter); *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 323, HL, per Lord Eldon; *Moran, Galloway & Co v Uzielli* [1905] 2 KB 555 (as to which see PARA 367 note 2 ante). In the event of the assured becoming bankrupt or (in the case of a company) being wound up, or having a receiver or manager appointed, or possession taken of any of the property by or on behalf of debenture holders, the benefit of the insurance will be transferred to the third party by virtue of the Third Parties (Rights against Insurers) Act 1930 (as amended): see PARAS 678-684 post.

5 *Briggs v Merchant Traders' Ship Loan and Insurance Association* (1849) 13 QB 167.

6 *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103 at 116.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/371. Insurable interest in profits.

371. Insurable interest in profits.

In order to have an insurable interest in profits, the assured must either be the owner of goods or have entered into a legally binding contract for the purchase of them¹. Moreover, under a valued policy² on profits, he must prove that except for the loss he would have derived some profit³, and, in the case of an unvalued policy⁴, he cannot recover more than the amount of profit he would have made if the loss had not occurred⁵.

1 *Stockdale v Dunlop* (1840) 6 M & W 224; *Sparkes v Marshall* (1836) 2 Bing NC 761. As to what profits will be covered under the phrase 'beginning of the adventure etc' see PARA 298 note 1 ante.

2 For the meaning of 'valued policy' see PARA 222 ante.

3 *Hodgson v Glover* (1805) 6 East 316.

4 For the meaning of 'unvalued policy' see PARA 222 ante.

5 *Eyre v Glover* (1812) 16 East 218.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/A. MEANING; NATURE OF INTEREST/372. When interest must exist.

372. When interest must exist.

In order to recover under a policy the assured must be interested in the subject matter insured at the time of the loss, though he need not be interested when the insurance is effected, provided that where the subject matter is insured 'lost or not lost', the assured may recover although he may not have acquired his interest until after the loss¹.

It is not, therefore, a good defence to an action brought to recover a partial loss of goods on a policy 'lost or not lost' that the plaintiff first acquired an interest in the property after the loss occurred, for, where the assured purchased or acquired the goods as sound or undamaged goods, a loss has been sustained by him, and as the policy contains the clause 'lost or not lost' it covers that past loss². The same considerations would evidently apply to an action brought to recover a total loss of goods on a policy 'lost or not lost' if the contract under which the assured purchased the goods makes him liable for the price, even where the goods were totally lost at the time he made the contract. The assured cannot, however, recover for a loss of which, when the contract was effected, he was aware and the insurer was not³; moreover, if he has no insurable interest at the time of the loss, he cannot acquire such an interest by any act or election after he is aware of the loss⁴.

1 Marine Insurance Act 1906 s 6(1); *Rhind v Wilkinson* (1810) 2 Taunt 237; *Cousins v Nantes* (1811) 3 Taunt 513, Ex Ch. In *Marine Insurance Co Ltd v Grimmer* [1944] 2 All ER 197 at 201, CA, Scott LJ stated that the principle that the 'policy operates retrospectively to the loading of the insured goods' was inherent in every voyage policy in the old Lloyd's form, and that the words 'lost or not lost' are thus mere repetition of what the policy meant without them. See also Arnould on Marine Insurance (16th Edn) s 32.

2 *Sutherland v Pratt* (1843) 11 M & W 296 at 311-312; and see *Marine Insurance Co Ltd v Grimmer* [1944] 2 All ER 197 at 201, CA, per Scott LJ (reinsurance).

3 Marine Insurance Act 1906 s 6(1), Sch 1 r 1.

4 *Ibid* s 6(2); *Anderson v Morice* (1876) 1 App Cas 713 at 749, HL; *Stockdale v Dunlop* (1840) 6 M & W 224.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/B. INTERESTS IN SHIP, FREIGHT AND ADVANCE FREIGHT/373. Interest in ship.

B. INTERESTS IN SHIP, FREIGHT AND ADVANCE FREIGHT

373. Interest in ship.

A shipowner has an insurable interest in his ship, even when he has let her out to a charterer who has contracted to pay him her full value in case of her being lost, and he can in case of such loss recover the full value from the insurer, who is subrogated to the rights of the assured against the charterer¹.

¹ *Hobbs v Hannam* (1811) 3 Camp 93; Marine Insurance Act 1906 s 14(3). As to subrogation see PARAS 490-494 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/B. INTERESTS IN SHIP, FREIGHT AND ADVANCE FREIGHT/374. Interest in freight.

374. Interest in freight.

A shipowner has an insurable interest in freight¹. It is important, however, to observe that, as in the case of other interests, the shipowner's right to recover the insured freight depends on whether he had an insurable interest at the time of the loss², or in other words whether the risk had at that time attached. This question is discussed elsewhere³.

The shipowner may insure as 'anticipated freight' not merely the amount for which the vessel is already chartered at the time of the policy but the full amount which he reasonably expects the vessel to earn during the period of the insurance⁴.

The charterer, as well as the shipowner, may have an insurable interest in freight because a loss of the goods causes a loss of the bill of lading freight, but it has been suggested that as a general rule his insurable interest is not limited to the excess of the bill of lading freight over the charterparty freight. This, however, has not yet been decided. It may to some extent depend on the terms of the charterparty⁵. Such excess of the bill of lading freight may be insured as 'profit on charter'⁶.

1 See the Marine Insurance Act 1906 ss 3, 5(1); and PARA 296 ante. See also the judgments of Brett J and Bramwell B in *Rankin v Potter* (1873) LR 6 HL 83 at 98, 133. For the meaning of 'freight' when used to describe the subject matter of the policy see PARA 296 ante.

2 See the Marine Insurance Act 1906 s 6; and PARA 372 ante.

3 As to commencement and duration of the risk see PARA 302 et seq ante.

4 *Papadimitriou v Henderson* [1939] 3 All ER 908; see also *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 384, [1939] 2 All ER 723 at 729, HL, per Lord Wright.

5 See the Marine Insurance Act 1906 s 16(2); and PARA 432 post. In *United States Shipping Co v Empress Assurance Corp* [1907] 1 KB 259 (a case of sub-charter), the decision of Channell J was against the limitation. His judgment was affirmed, but without deciding any question of law, by the Court of Appeal: see [1908] 1 KB 115; and see Arnould on Marine Insurance (16th Edn) s 344.

6 *Asfar & Co v Blundell* [1895] 2 QB 196; affd [1896] 1 QB 123, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/B. INTERESTS IN SHIP, FREIGHT AND ADVANCE FREIGHT/375. Commencement of insurable interest in chartered freight.

375. Commencement of insurable interest in chartered freight.

Where the interest insured is chartered freight, that is to say freight to be paid to the shipowner by the terms of a charterparty¹ for the use of his ship or part of it on a voyage described in it, there is an insurable interest in the freight at the time of the inception of the voyage so described. Thus, where by the terms of the charterparty the ship is to proceed from A to B and at B to take a cargo for delivery at C, there is an insurable interest in the freight of this cargo as soon as the ship sails from A to proceed to B².

In short, there is an insurable interest in chartered freight as soon as the ship commences the voyage which she must make in order to acquire an inchoate right to the chartered freight³.

1 As to charterparties see generally CARRIAGE AND CARRIERS.

2 *Thompson v Taylor* (1795) 6 Term Rep 478; *Horncastle v Suart* (1806) 7 East 400; *Atty v Lindo* (1805) 1 Bos & PNR 236; *Mackenzie v Shedden* (1810) 2 Camp 431; *Davidson v Willasey* (1813) 1 M & S 313; *Foley v United Fire, etc, Insurance Co* (1870) LR 5 CP 155, Ex Ch; *Rankin v Potter* (1873) LR 6 HL 83.

3 See the cases cited in note 2 supra; and *Barber v Fleming* (1869) LR 5 QB 59 at 71, 73.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/B. INTERESTS IN SHIP, FREIGHT AND ADVANCE FREIGHT/376. Interest in advance freight.

376. Interest in advance freight.

In the case of advance freight¹, the person advancing the freight has an insurable interest in so far, but only in so far, as the freight is not repayable in case of loss². Whether the money advanced is or is not repayable in case of loss depends upon the terms of the charterparty or other agreement under which the money is advanced³. A passenger who has paid his passage money has an insurable interest in it, but it must be designated in the policy as passage money⁴.

1 As to what constitutes advance freight see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 600-602.

2 Marine Insurance Act 1906 s 12. See also PARA 297 text to note 2 ante.

3 The principal cases bearing upon this question are *De Silvale v Kendall* (1815) 4 M & S 37; *Manfield v Maitland* (1821) 4 B & Ald 582 at 585; *Wilson v Martin* (1856) 11 Exch 684; *Winter v Haldimand* (1831) 2 B & Ad 649; *Hicks v Shield* (1857) 7 E & B 633; *The Karnak* (1869) LR 2 PC 505 at 514; *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209 at 222, 229, 234, HL; *Watson & Co v Shankland* (1873) LR 2 Sc & Div 304, HL. See further CARRIAGE AND CARRIERS.

4 See the Marine Insurance Act 1906 ss 3, 5(1); *Denoon v Home and Colonial Assurance Co* (1872) LR 7 CP 341; and PARA 296 text and note 6 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/377. Seller and buyer.

C. PARTICULAR INTERESTS

377. Seller and buyer.

As long as the seller of a ship or of goods retains any interest in the property, he can insure it to the extent of his interest. Thus, where the owner of a ship has sold her under a contract which binds him to pay the purchaser a certain sum if a loss should happen within a specified time, he has an insurable interest to the extent of that sum¹. When, however, the property which is the subject matter of the contract of sale has completely passed from the seller to the buyer, or when it has under the contract of sale become completely at the buyer's risk, the seller ceases to have any insurable interest, and the buyer acquires one². Thus, a contract for the sale of goods to be supplied on board a particular vessel may be so framed that the property in them and the risk of their loss do not pass to the buyer until a complete cargo has been loaded, in which case the buyer has no insurable interest until the complete cargo has been loaded³; or the contract may be so framed that the property in and the risk as to any part of the goods pass to the buyer on shipment, in which case the buyer acquires an insurable interest on any part of the goods then shipped⁴.

An unpaid seller of goods has a right of stoppage in transit if the buyer has become insolvent and the goods are stopped before they get into the buyer's possession and before the buyer has transferred them to a sub-buyer by indorsement of the bill of lading; but it follows from the above principles that the seller has no insurable interest unless and until he has effectually stopped the goods in transit⁵.

1 *Reed v Cole* (1764) 3 Burr 1512; cf *North of England Oil-Cake Co v Archangel Insurance Co* (1875) LR 10 QB 249, DC.

2 *Joyce v Swann* (1864) 17 CBNS 84; *Ionides v Harford* (1859) 29 LJEx 36 (termination of risk by transfer of property); *Seagrave v Union Marine Insurance Co* (1866) LR 1 CP 305; *Sparkes v Marshall* (1836) 2 Bing NC 761; *Inglis v Stock* (1885) 10 App Cas 263, HL. As to the question whether and when under a contract for the sale of goods the property passes to the buyer or is at his risk see *Fragano v Long* (1825) 4 B & C 219; *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 142 et seq.

3 *Anderson v Morice* (1875) LR 10 CP 609, Ex Ch (affd (1876) 1 App Cas 713, HL (the House being equally divided)); *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103 (vessel to be at seller's risk until delivery in England).

4 *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC. See also *J Aron & Co Inc v Miall* (1928) 139 LT 562, CA (c i f contract); *Yangtze Insurance Association Ltd v Lukmanjee* [1918] AC 585, PC (sale 'ex-ship'); and see *Plata American Trading Inc and Nordhandel Gesellschaft Ruecker-Giehr & Co v Lancashire, Hamburg-Amerika Linie and Charles Martin & Co* [1957] 2 Lloyd's Rep 347 (cargo of tallow insured 'warehouse to warehouse' by buyers; cargo delivered short for transit; missing quantity never in transit and never became property of buyers, who, therefore, had no insurable interest: underwriters not liable for missing quantity).

5 *Clay v Harrison* (1829) 10 B & C 99; Arnould on Marine Insurance (16th Edn) s 369. Such an interest cannot be acquired after a loss by any election made with knowledge of it: see PARA 372 ante. See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 256 et seq; CARRIAGE AND CARRIERS.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/378. Mortgagor and mortgagee.

378. Mortgagor and mortgagee.

Where the subject matter insured is mortgaged, the mortgagor has an insurable interest in its full value and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage¹. A mortgagee, consignee or other person having an interest in the subject matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit².

The mortgagor has an insurable interest in the full value of the property insured, even though it is mortgaged to its full value, because in case of loss he would not only be deprived of the property but would also remain liable for the mortgage debt³. Where the mortgagor has contracted to insure the mortgaged property on account of the mortgagees, he holds the proceeds of the insurance policy in trust for them⁴.

The amount recoverable by a mortgagee under a policy effected by him will depend upon the intention he had in effecting it. If he intended the policy to cover the whole interest, that is his own interest and that of the mortgagor⁵, he can recover the whole amount insured under trust, as to the surplus, to hold it for the mortgagor; but if he intended it only to cover his own interest as mortgagee, he can recover only to the extent of the mortgage debt⁶.

1 Marine Insurance Act 1906 s 14(1).

2 Ibid s 14(2). As to the interest of persons entitled to indemnity see PARA 384 post. As to the onus of proving, and evidence required to prove, that the mortgagee's or other person's interest is covered see PARA 388 note 5 post, and the cases there cited.

3 *Alston v Campbell* (1779) 4 Bro Parl Cas 476; *Ward v Beck* (1863) 13 CBNS 668 (an instrument which is in form an absolute transfer may be shown to be a mortgage). See *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233, [1991] 3 All ER 1, HL (insurers who failed to inform mortgagees that insurance had been avoided by the assured's causing vessels to enter prohibited zone, were in breach of an undertaking so to inform and liable upon that breach).

4 *Ladbroke v Lee* (1850) 4 De G & Sm 106 at 119; *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw* [1907] 1 KB 116 at 121; cf *Levy & Co v Merchants Marine Insurance Co* (1885) 52 LT 263.

5 See the Marine Insurance Act 1906 s 14(2); and the text and notes supra.

6 *Irving v Richardson* (1831) 2 B & Ad 193; *Carruthers v Sheddon* (1815) 6 Taunt 14 at 17. Cf, however, *Denoon v Home and Colonial Assurance Co* (1872) LR 7 CP 341, where some parts of the judgment are difficult to reconcile with the other cases. The amount recoverable by the mortgagee in respect of his own interest is the amount due from the mortgagor at the date of the loss; sums which became due at a later date cannot be taken into account: *Chartered Trust and Executor Co v London Scottish Assurance Corp Ltd* (1923) 39 TLR 608; *Handelsbanken ASA v Dandridge* [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39, [2002] 2 Lloyd's Rep 421.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/379. Trustee.

379. Trustee.

A trustee who has the legal interest in the subject matter insured may insure in respect of that interest to the full value of the subject matter, and may recover the whole amount, alleging the interest to be in himself, and he will then hold it in trust for his beneficiary¹.

¹ *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 323-324, HL, per Lord Eldon; *Ebsworth v Alliance Marine Insurance Co* (1873) LR 8 CP 596 at 638 per Brett J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/380. Consignee.

380. Consignee.

A consignee who at the time of the loss has a lien or charge on the property in respect of advances, and an indorsee of a bill of lading to whom a general balance is due, can effect an insurance on their own account, and can recover, averring their interest to be in themselves to the amount of their lien, charge or balance. They can also protect in the same insurance their own interest and the interest of other parties in the property, averring the interest to be in themselves and in those other parties¹. A consignee who at the time of the loss has a mere naked right to take possession can recover on a policy effected by him, but only if he alleges the interest in the consignor, and also proves that the consignor has authorised, or subsequently adopted, the policy².

A consignee has an insurable interest in his commission if at the time of the loss he has a binding contract for the consignment to him of a cargo³.

¹ See the Marine Insurance Act 1906 s 14(2); and PARA 378 ante. This provision embodies the law as laid down in *Wolff v Horncastle* (1798) 1 Bos & P 316; *Hill v Secretan* (1798) 1 Bos & P 315; *Robertson v Hamilton* (1811) 14 East 522; *Carruthers v Sheddon* (1815) 6 Taunt 14. See also *Sutherland v Pratt* (1843) 12 M & W 16; *Hibbert v Carter* (1787) 1 Term Rep 745; *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ.

² *Lucena v Craufurd* (1806) 2 Bos & PNR 269, HL, per Lord Eldon; *Seagrave v Union Marine Insurance Co* (1866) LR 1 CP 305 at 319-320 per Willes J. Whether a consignee for sale to whom at the time of the loss the legal property in the goods has not passed, but who was beneficially interested in the whole of them, can recover the full value on an averment of interest in himself alone, or whether he must also aver the interest of the other parties, is a question on which the Court of Common Pleas was equally divided in *Ebsworth v Alliance Marine Insurance Co* (1873) LR 8 CP 596, but this question can only be material when there are peculiar circumstances, such as existed in that case, which make the plaintiff unwilling to aver the interest in himself and the consignor.

³ See *Ward & Co Ltd v Weir & Co* (1899) 4 Com Cas 216 at 223 per Mathew J (shipowner has insurable interest in commission payable by him in case of loss). Cf *Knox v Wood* (1808) 1 Camp 543; *Buchanan & Co v Faber* (1899) 4 Com Cas 223 at 226 per Bigham J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/381. Captors.

381. Captors.

Captors, prize agents and others have often effected policies on captured property. The captors generally are in possession of the property captured, and are liable to pay costs and charges if they have taken possession improperly, and are also liable to return property if it should turn out to be neutral. They therefore have an interest in the property¹.

¹ *Boehm v Bell* (1799) 8 Term Rep 154 at 161; *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 323-324, HL, per Lord Eldon. Captors and prize agents will, according to the present practice, aver the interest to be in themselves and the Crown or some one or more of them, and that the insurance was effected on behalf of the person so interested, and in so far as the captors have not an insurable interest in the property the Crown can obtain the benefit of the policy. On this subject see *Le Cras v Hughes* (1782) 3 Doug KB 81, as explained in *Lucena v Crauford* supra; *Craufurd v Hunter* (1798) 8 Term Rep 13; *Stirling v Vaughan* (1809) 11 East 619; *Routh v Thompson* (1811) 13 East 274 at 284-285; *Devaux v Steele* (1840) 6 Bing NC 358 at 370. Nothing in the Naval Prize Act 1864 gives officers and crew of any of Her Majesty's ships of war or military aircraft any right in prize ships, aircraft or goods; they take only such interest, if any, as may be granted to them by the Crown: see s 55(1) (amended by the Prize Act 1939 s 1(2), Schedule Pt I); and PRIZE.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/382. Master and crew; bottomry and respondentia.

382. Master and crew; bottomry and respondentia.

The master or any member of the crew of a ship has an insurable interest in respect of his wages¹.

The lender of money on bottomry or respondentia² has an insurable interest in respect of the loan³, because the borrower is discharged from liability if the ship or goods which are hypothecated are totally lost⁴. In order that an assured may be entitled to recover under a policy on bottomry or respondentia, the bond or instrument of hypothecation must be legally valid, creating a maritime risk; and therefore nothing can be recovered under the policy if the money is made repayable in any event and whether the property hypothecated is or is not lost on the insured voyage⁵. The borrower on bottomry or respondentia continues to have an insurable interest in the hypothecated ship or goods, inasmuch as the debt is discharged only if the property is totally lost⁶.

1 Marine Insurance Act 1906 s 11.

2 As to the nature and incidents of bottomry or respondentia see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 437.

3 Marine Insurance Act 1906 s 10.

4 As to the necessity of specifically describing such interests in the policy see PARA 299 ante.

5 *Simonds v Hodgson* (1832) 3 B & Ad 50; *Stainbank v Fenning* (1851) 11 CB 51; *Stainbank v Shepard* (1853) 13 CB 418.

6 It seems, however, on principle, open to much doubt whether the assured in case of a total loss of the property hypothecated can recover anything more than the excess of the insurable value of the property over the amount of the debt.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/383. Shareholders in companies.

383. Shareholders in companies.

There may be an insurable interest in an adventure without an insurable interest in any of the property at risk. Thus, a shareholder in a company is not a part owner of the property of the company, inasmuch as the property belongs to the company, which is a legal entity independent of its shareholders¹. But a shareholder in a company established for the laying of a submarine cable has an insurable interest in the adventure which he can protect by a properly worded policy².

¹ *R v Arnaud* (1846) 9 QB 806; *Salomon v Salomon & Co Ltd*, *Salomon & Co Ltd v Salomon* [1897] AC 22, HL; see COMPANIES vol 14 (2009) PARA 2.

² See the Marine Insurance Act 1906 s 5(2); *Wilson v Jones* (1867) LR 2 Exch 139, Ex Ch; cf *Paterson v Harris* (1862) 2 B & S 814, where a shareholder in a telegraph company was held, by reason of the peculiar wording of the policy, to have insured the submarine cable itself. It is to be observed, however, that in that case the assured's interest was not disputed. See these cases discussed in *Macaure v Northern Assurance Co Ltd* [1925] AC 619, HL, cited in PARA 367 note 2 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/C. PARTICULAR INTERESTS/384. Person entitled to be indemnified by another.

384. Person entitled to be indemnified by another.

The owner of insurable property has an insurable interest in respect of its full value, notwithstanding that some third person may have agreed, or is liable, to indemnify him in case of loss¹. Thus, where the owner of a vessel lets her out under a charterparty to a charterer who contracts, in case of loss, to pay him her full value, he has a right to insure to the full amount, for he is not bound to trust exclusively to the charterer's credit². So also the owner of goods³ may insure them for their full value, and in case of loss recover that amount from the insurer, although the carrier may also be liable to indemnify him against their loss⁴. In these cases the insurer will be subrogated to the rights of the assured against the party liable to indemnify him⁵.

1 Marine Insurance Act 1906 s 14(3). As to indemnity generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255 et seq.

2 *Hobbs v Hannam* (1811) 3 Camp 93.

3 For the meaning of 'goods' see PARA 295 ante.

4 The carrier also has an insurable interest: see the Marine Insurance Act 1906 s 3(2)(c); and PARA 217 ante. See also PARA 370 ante, and the cases there cited.

5 As to subrogation see generally EQUITY; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138. See also PARAS 490-494 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/D. REINSURANCE/385. Reinsurance.

D. REINSURANCE

385. Reinsurance.

Inasmuch as he is liable on a contract of insurance, the insurer may insure against the risk which he has taken upon himself. This second contract of insurance is called a contract of reinsurance¹. The insurer under a contract of insurance, including a contract of marine insurance², has an insurable interest in his risk, and may reinsure in respect of it³. A reinsurance agreement may be expressed so as to constitute a further insurance on the original risk⁴, although reinsurance is generally to be regarded as a form of liability cover⁵. As it is generally unnecessary to state in the policy the nature of the assured's interest, the fact that the contract is one of reinsurance need not necessarily appear on the face of the policy⁶. A contract of reinsurance is subject to the same rules as a direct contract⁷, although the reinsured need not give a notice of abandonment in the case of a total loss⁸.

1 For reinsurance generally and the specific issues which relate to reinsurance contracts see PARAS 766-779 post.

2 For the meaning of 'contract of marine insurance' see PARA 216 ante.

3 See the Marine Insurance Act 1906 s 9(1). A reinsured risk may itself be reinsured; a contract of this type is known as a contract of retrocession.

4 *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807; and cf *Re Friends Provident Life Office* [1999] 2 All ER (Comm) 437, [1999] Lloyd's Rep IR 547, CA.

5 *Agnew v Lansforsakringsbolagens AB* [2001] 1 AC 223, [2000] 1 All ER 737, [2000] Lloyd's Rep IR 317, HL; Case C-412/98 *Société Group Josi Reinsurance Co SA v Universal General Insurance Co* [2000] 2 All ER (Comm) 467, [2001] Lloyd's Rep IR 483, ECJ.

6 *Mackenzie v Whitworth* (1875) 1 ExD 36, CA.

7 In the context of reinsurance the original contract of insurance which is the subject of the reinsurance is referred to as the 'direct contract'.

8 See the Marine Insurance Act 1906 s 62(9); *Uzielli v Boston Marine Insurance Co* (1884) 15 QBD 11, CA. As to notice of abandonment see further PARAS 469, 478-485 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/E. WAGERING POLICIES/386. Wagering and ppi policies.

E. WAGERING POLICIES

386. Wagering and ppi policies.

At common law, insurances by way of gaming or wagering were valid, but a policy which did not contain a clause expressly dispensing with proof of interest, or which did not otherwise show that the contract was not intended to be one of indemnity, was deemed to be a contract of indemnity on which the assured could not recover without proof of interest¹. A policy expressly made 'interest or no interest' or 'without further proof of interest than the policy itself' or 'without benefit of salvage to the insurer' is usually called a 'ppi policy' (that is to say, policy proof of interest) or 'an honour or wager policy'².

Under the Gaming Act 1845, all contracts or agreements by way of gaming or wagering are null and void³. This applies to all insurances which are really wagers, whether or not they are in the form of ppi policies; but a ppi policy is not necessarily inconsistent with the assured having an insurable interest⁴; indeed, it might happen that such a policy is effected by a person who has an insurable interest but who wishes to avoid the difficulty of proving it. In that case the policy would not be a wagering contract within this particular provision of the Gaming Act 1845⁵, although it will be void by virtue of the Marine Insurance Act 1906⁶.

The Marine Insurance Act 1906 provides that every contract of marine insurance⁷ by way of gaming or wagering is void⁸. A contract of marine insurance is deemed to be a gaming or wagering contract where the assured has no insurable interest (as defined by that Act⁹), and the contract is entered into with no expectation of acquiring such an interest¹⁰. Similarly, the contract is deemed to be a gaming or wagering contract where the policy is made 'interest or no interest' or 'without further proof of interest than the policy itself', or 'without benefit of salvage to the insurer', or subject to any other like term¹¹, but where there is no possibility of salvage a policy may be effected without benefit of salvage to the insurer¹².

1 *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 321, HL, per Lord Eldon; *Cousins v Nantes* (1811) 3 Taunt 513, Ex Ch.

2 By the Marine Insurance Act 1745 (which, however, did not extend to Ireland (*Keith v Protection Marine Insurance Co* (1882) 10 LR Ir 51), nor to foreign ships (*Thellusson v Fletcher* (1780) 1 Doug KB 315)), such ppi policies, as well as all other policies by way of gaming and wagering, if they were insurances on British ships, or cargoes, or interests relating to the same, were, with certain unimportant exceptions, prohibited. As to this enactment (now repealed: see note 6 infra) see *Allkins v Jupe* (1877) 2 CPD 375; *Berridge v Man on Insurance Co* (1887) 18 QBD 346, CA, following *Smith v Reynolds* (1856) 1 H & N 221, and *De Mattos v North* (1868) LR 3 Exch 185.

3 Gaming Act 1845 s 18 (amended by the Statute Law Revision Act 1891). As to wagering contracts in general see LICENSING AND GAMBLING vol 67 (2008) PARA 319.

4 For the meaning of 'insurable interest' see PARA 366 ante.

5 *Wilson v Jones* (1867) LR 2 Exch 139 at 146.

6 See text and notes 7-12 infra. The Marine Insurance Act 1906 s 92, Sch 2 (repealed) repealed the Marine Insurance Act 1745 (see note 2 supra), but not the Gaming Act 1845 s 18 (see text and note 3 supra).

7 For the meaning of 'contract of marine insurance' see PARA 216 ante.

8 Marine Insurance Act 1906 s 4(1).

9 See *ibid* s 5; and PARA 366 ante.

10 *Ibid* s 4(2)(a).

11 *Ibid* s 4(2)(b). A policy containing a ppi clause is void even though the assured may in fact have had an insurable interest: *T Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240 at 254, CA. The fact that the clause is printed on a detachable slip and is expressed to be 'no part of the policy and not to be attached thereto, but is to be considered as binding in honour on the underwriters, the assured, however, having permission to remove it from the policy should they so desire,' will not prevent the policy from being void. A claim on a ppi policy cannot be enforced in a winding up, but the premiums are returnable: *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67 at 85. There can be no right of subrogation under a ppi policy: *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249. The court will not treat such a policy as valid even if the insurer desires it to do so: *Gedge v Royal Exchange Assurance Corp*n [1900] 2 QB 214 at 220, distinguishing *Buchanan & Co v Faber* (1899) 4 Com Cas 223 at 227, where Bigham J, by consent, treated the policy as if it had contained no ppi clause. It is doubtful whether the court would adopt this course now: see *T Cheshire & Co v Vaughan Bros & Co* supra at 252 per Scrutton LJ.

12 Marine Insurance Act 1906 s 4(2) proviso.

UPDATE

386 Wagering and ppi policies

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 3--Gaming Act 1845 repealed: Gambling Act 2005 Sch 17. Contracts or agreements by way of gaming or wagering are no longer null and void: see s 335; and LICENSING AND GAMBLING vol 67 (2008) PARA 327.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(ii) Insurable Interest/E. WAGERING POLICIES/387. Criminal offence to gamble on losses.

387. Criminal offence to gamble on losses.

If any person effects a contract of marine insurance¹ without having any bona fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject matter insured, or a bona fide expectation of acquiring such an interest; or if any person in the employment of the owner² of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made 'interest or no interest', or 'without further proof of interest than the policy itself', or 'without benefit of salvage to the insurer', or subject to any other like term, the contract is deemed to be a contract by way of gambling on loss by maritime perils³; and the person who effects it, and any broker or other person through whom, and any insurer with whom, it is effected (if these persons act knowingly) are guilty of an offence⁴, and liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 3 on the standard scale, and, in either case, forfeiture to the Crown of the proceeds of the contract⁵.

1 For the meaning of 'contract of marine insurance' in the Marine Insurance Act 1906 see PARA 216 ante.

2 For this purpose, 'owner' includes charterer: Marine Insurance (Gambling Policies) Act 1909 s 1(8).

3 Ibid s 1(1). For the meaning of 'maritime perils' see PARA 217 ante.

4 Ibid s 1(1), (2). Proceedings may not be instituted without the consent of the Attorney General (s 1(3)); nor, in the case of a person not in the shipowner's employment, until he has had an opportunity of showing that the contract was not a gambling contract, and information given by him for this purpose is not admissible in evidence against him in any prosecution under the Act (s 1(4)). But as against such a person a contract in the terms specified above ('interest or no interest' etc) is deemed to be a gambling contract unless the contrary is proved: s 1(5). An offence is deemed to have been committed either where it was actually committed or in any place where the offender is: s 1(6). An appeal lies to the Crown Court: s 1(7) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I). As to the procedure on appeals see MAGISTRATES.

5 Marine Insurance (Gambling Policies) Act 1909 s 1(1) (amended by virtue of the Criminal Justice Act 1948 s 1(2); and the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 22 note 9 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(iii) Ratification and Assignment/388. Ratification by the assured.

(iii) Ratification and Assignment

388. Ratification by the assured.

Where a contract of marine insurance¹ is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss². Thus, where a merchant after the loss hears that a policy has been effected on his behalf although without his authority, he can at any time ratify the insurance and sue upon the policy³. The general rule is, however, subject to the condition that a person cannot avail himself of the policy unless it was intended in good faith to protect his interest, or at any rate to protect the interest generally of the parties who should appear ultimately to be concerned⁴. If, therefore, a policy was effected by A to protect the interest only of B, no third person would be allowed to avail himself of that policy⁵.

1 For the meaning of 'contract of marine insurance' see PARA 216 ante.

2 Marine Insurance Act 1906 s 86.

3 *Williams v North China Insurance Co* (1876) 1 CPD 757 at 767, 770, CA; *Hagedorn v Oliverson* (1814) 2 M & S 485; *Lucena v Craufurd* (1808) 1 Taunt 325, HL; *Routh v Thompson* (1811) 13 East 274; *Barlow v Leckie* (1819) 4 Moore CP 8. Ratification after loss is peculiar to marine insurance: *Grover and Grover Ltd v Mathews* [1910] 2 KB 401 at 404.

4 2 Duer on Marine Insurance 30, 135; and see the cases cited in note 3 supra.

5 *Boston Fruit Co v British and Foreign Insurance Co Ltd* [1906] AC 336 at 339, HL; *Yangtsze Insurance Association Ltd v Lukmanjee* [1918] AC 585, PC. When a policy is effected in the name of brokers 'and/or as agents', a party interested in the subject matter insured cannot ratify the policy unless the principal upon whose instructions the insurance was effected intended to insure the interest of the party in question: *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (No 2)* [1923] 1 KB 592, CA; affd [1924] AC 294, HL. In deciding the question for whom the insurance was effected, the intention of the principal who gave the instructions on which the insurance was effected is alone material; the intention of the brokers who effected the policy on those instructions is not material: *Boston Fruit Co v British and Foreign Marine Insurance Co Ltd* supra; *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (No 2)* supra; *P Samuel & Co Ltd v Dumas* [1923] 1 KB 592, CA (affd on another point [1924] AC 431, HL). The onus of proving that the insurance was intended to cover his interest lies on the person making this allegation: *Yangtsze Insurance Association Ltd v Lukmanjee* supra. On the subject of ratification see also *Routh v Thompson* (1811) 13 East 274, explaining at 281 *Routh v Thompson* (1809) 11 East 428; *Grant v Hill* (1812) 4 Taunt 380; *Irving v Richardson* (1831) 2 B & Ad 193; *Watson v Swann* (1862) 11 CBNS 756; *Scott v Globe Marine Insurance Co Ltd* (1896) 1 Com Cas 370; *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 QB 42 (on appeal [1897] 2 QB 311, CA); *Byas v Miller* (1897) 3 Com Cas 39; and see AGENCY vol 1 (2008) PARAS 57-70.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(8) WHO CAN AVAIL HIMSELF OF THE INSURANCE/(iii) Ratification and Assignment/389. Assignment of policy.

389. Assignment of policy.

A marine policy is not an incident to the property insured; accordingly, a transfer of the property insured does not by itself effect the transfer of the policy to the assignee¹. Moreover, where the assured has parted with or lost his interest in the subject matter insured before the loss occurs and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative². However, once the loss has occurred and the right to indemnity has therefore crystallised, the assured can assign his interest under the policy irrespective of whether or not he has parted with or lost his interest in the subject matter insured between loss and assignment³.

If, therefore, the assured parts with the whole of his interest in the insured property⁴ before the loss without assigning the policy of insurance and without an agreement to assign or hold it for the benefit of the transferee, the policy becomes unavailable to anyone⁵. On the other hand, if at the time of the transfer of the insured property the transferor assigned the policy, or agreed to assign it or to hold it for the transferee's benefit, the transferee was always entitled to maintain an action on the policy in the assured's name⁶, and this could be done even if the assured had become a bankrupt after the assignment⁷.

Where a marine policy has been assigned so as to pass the beneficial interest⁸ in it, the assignee is entitled to sue on it in his own name, and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected⁹.

A marine policy is assignable either before or after loss unless it contains terms expressly prohibiting assignment¹⁰, and it may be assigned by indorsement or in any other customary manner¹¹.

The assignee of a policy can only avail himself of the insurance to the extent to which the assured has agreed to assign his rights to him¹².

1 Where the assured assigns or otherwise parts with his interest in the subject matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance unless there is an express or implied agreement with the assignee to that effect; this provision does not, however, affect a transmission of interest by operation of law: Marine Insurance Act 1906 s 15.

2 Ibid s 51.

3 Ibid ss 50(1), 51 proviso.

4 It is otherwise if he parts only with some portion of his interest, eg where he only pledges or mortgages the insured property: *Hibbert v Carter* (1787) 1 Term Rep 745; *Alston v Campbell* (1779) 4 Bro Parl Cas 476.

5 *North of England Oil-Cake Co v Archangel Insurance Co* (1875) LR 10 QB 249.

6 *Powles v Innes* (1843) 11 M & W 10; *Sparkes v Marshall* (1836) 2 Bing NC 761 at 774; *Gibson v Winter* (1833) 5 B & Ad 96 (assignee suing in assignor's name is subject to all rights of defence that can be raised against the assignor).

7 *Castelli v Boddington* (1852) 1 E & B 66; affd sub nom *Boddington v Castelli* (1853) 1 E & B 879, Ex Ch.

8 Ie the whole beneficial interest: see *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC, The Mount* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257.

9 Marine Insurance Act 1906 s 50(2). A defence of non-disclosure by the assignor is a defence arising out of the contract within the meaning of s 50(2): *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614. It is a good defence to a claim by an innocent third party (eg a mortgagee) whose title to the policy is by assignment from the assured, that the loss was attributable to the assured's wilful misconduct: *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (No 2)* [1924] AC 294, HL. It is otherwise if the third party's interest was separately insured: *P Samuel & Co Ltd v Dumas* [1924] AC 431 at 445, HL. If, however, the loss is proximately caused by and not merely attributable to the assured's wilful misconduct, the insurer will not be liable to the third party even if separately insured: *P Samuel & Co Ltd v Dumas* supra; and see PARA 359 ante. The claim under the policy being unliquidated, a set-off of premiums due from the assignor is not an available defence under this provision: *Pellas v Neptune Marine Insurance Co* (1879) 5 CPD 34, CA; *Castelli v Boddington* (1852) 1 E & B 66 (affd sub nom *Boddington v Castelli* (1853) 1 E & B 879, Ex Ch); and see *Baker v Adam* (1910) 15 Com Cas 227.

10 Marine Insurance Act 1906 s 50(1); *Lloyd v Fleming* (1872) LR 7 QB 299; *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw* [1907] 1 KB 116 at 123 (assignment of claim without assigning policy). For a clause prohibiting assignment see *Pyman v Marten* (1906) 24 TLR 10, CA. Unless a policy imposes such a condition, the insurer's consent is never necessary to the validity of the assignment. For a case in which the policy imposed such a condition see *Laurie v West Hartlepool Steamship Thirds Indemnity Association and David* (1899) 4 Com Cas 322.

11 Marine Insurance Act 1906 s 50(3). It seems that mere delivery is not a 'customary manner' (*Baker v Adam* (1910) 15 Com Cas 227 at 230 per Hamilton J); but indorsement in blank first by the brokers who effected the policy and then by the assured assigns all claims on the policy to a holder of the policy (*J Aron & Co (Inc) v Miall* (1928) 34 Com Cas 18, CA). The Institute Time Clauses (Hulls) cl 21, and the Institute Voyage Clauses (Hulls) cl 19 (and see the Institute War and Strikes Clauses (Hulls--Time) cl 2; and the Institute War and Strikes Clauses (Hulls--Voyage) cl 2) contain a special provision concerning assignment of policies. As to the Institute Clauses see PARA 330 ante.

12 *Ionides v Harford* (1859) 29 LJEx 36; *Strass v Spillers and Bakers Ltd* [1911] 2 KB 759; cf *Ralli v Universal Marine Insurance Co* (1862) 4 De GF & J 1; *Landauer v Asser* [1905] 2 KB 184, DC. As to assignment see generally CHOSER IN ACTION vol 13 (2009) PARA 1 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/390. Effect of fraud on policy.

(9) AVOIDANCE OF POLICY

(i) Fraud, Concealment or Non-disclosure

390. Effect of fraud on policy.

A contract of marine insurance, like any other contract, is voidable on the ground of fraud, and any fraudulent misrepresentation (whether or not it is material within the meaning of the Marine Insurance Act 1906¹) made in order to induce the insurer to enter into the contract entitles him to avoid the policy, unless it is proved either that he knew the true state of facts at the time of contracting or that he did not rely on the misrepresentation². Independently, however, of fraud, a misrepresentation as to material facts, or a non-disclosure of material facts, may entitle the insurer to avoid the contract³.

1 See the Marine Insurance Act 1906 s 20(2); and PARA 409 post. See also PARAS 397, 408 post.

2 *Smith v Chadwick* (1882) 20 ChD 27 at 44, CA, per Jessel MR (affd (1884) 9 App Cas 187 at 190, HL, per Lord Selborne LC); *Arnison v Smith* (1889) 41 ChD 348 at 368-369, CA, per Lord Halsbury LC. As to the effect of fraud in vitiating a contract see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 781 et seq.

3 See the Marine Insurance Act 1906 ss 18, 20; and PARAS 393-409 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/391. Contract of insurance is a contract of the utmost good faith.

391. Contract of insurance is a contract of the utmost good faith.

It is a fundamental principle that a contract of marine insurance¹ is a contract based on the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party². Thus, if, when the contract is concluded³, the assured knew of the loss of the insured ship, the insurer may avoid the contract, and similarly, if at that time the insurer knew that the insured ship had safely arrived at her destination, the assured may avoid the contract and recover the premium⁴.

1 For the meaning of 'contract of marine insurance' see PARA 216 ante.

2 Marine Insurance Act 1906 s 17. In every contract of marine insurance there is an implied condition that there is no misrepresentation or concealment: *Blackburn, Low & Co v Vigors* (1886) 17 QBD 553 at 561, CA, per Lord Esher MR (approving 1 Phillips' Law of Insurance (5th Edn) s 537); affd (1887) 12 App Cas 531, HL. Cf FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1022. The insurer must adduce evidence to prove that the fact was not disclosed: *Visscherij Maatschappij Nieuw Onderneming v Scottish Metropolitan Assurance Co Ltd* (1922) 27 Com Cas 198, CA; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA. Where there is prima facie evidence of non-disclosure, the onus shifts to the assured to prove that he disclosed the fact: *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, CA; affd [1927] AC 139, HL (burglary insurance).

3 Ie when the assured's proposal is accepted: see PARA 393 note 1 post.

4 *Carter v Boehm* (1766) 3 Burr 1905 at 1909 per Lord Mansfield CJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/392. Continuation of the duty of good faith after conclusion of the contract.

392. Continuation of the duty of good faith after conclusion of the contract.

The principle of the utmost good faith¹ has a continuing relevance to the parties conduct after the contract is concluded, at least in relation to a duty of disclosure². The extent of the duty depends on the particular circumstances³. However, there is a clear distinction to be made between the pre-contract duty of disclosure⁴ and any duty of disclosure which may exist after the contract is made. In the latter case an injured party will not be able to avoid the contract as a whole but must rely on his contractual remedies⁵. Any continuing duty of disclosure ceases upon the commencement of litigation; from this time on the rules of the court govern the relations of the parties⁶.

1 As to the utmost good faith see PARA 391 ante.

2 *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 Lloyd's Rep 389.

3 See eg *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 Lloyd's Rep 389; *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563; *Agapitos v Agnew* [2002] EWCA Civ 247, [2003] QB 556, [2002] 1 All ER (Comm) 714.

4 As to the pre-contract duty of disclosure see PARA 393 et seq post.

5 *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1 at [57], [2001] 1 Lloyd's Rep 389 at [57], [2001] 1 All ER 743 at [57], per Lord Hobhouse. It is only appropriate to invoke the remedy of avoidance in a post-contractual context in situations analogous to situations where the insurer has a right to terminate for a pre-contract breach: *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* [2001] EWCA Civ 1275 at [35], [2001] 2 Lloyd's Rep 563 at [35] per Longmore LJ. As to the pre-contract position see PARA 49 ante.

6 *Manifest Shipping & Co Ltd v Uni Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 Lloyd's Rep 389; *Agapitos v Agnew* [2002] EWCA Civ 247, [2003] QB 556, [2002] 1 All ER (Comm) 714.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/393. Duty of assured to disclose material facts.

393. Duty of assured to disclose material facts.

Before the contract is concluded¹ the assured must disclose to the insurer every material² circumstance³, subject to certain exceptions mentioned below, known to the assured; if the assured fails to make such disclosure, the insurer may avoid the contract⁴. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk⁵. An assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him⁶.

In the absence of inquiry the following circumstances⁷ need not be disclosed:

- 109 (1) any circumstance which diminishes the risk⁸;
- 110 (2) any circumstance which is known or presumed to be known to the insurer⁹;
- 111 (3) any circumstance as to which information is waived by the insurer¹⁰; and
- 112 (4) any circumstance which it is superfluous to disclose by reason of any express or implied warranty¹¹.

Where an insurance is effected for the assured by an agent, the agent must, subject to the exceptions listed above¹², disclose to the insurer:

- 113 (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him¹³; and
- 114 (b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent¹⁴.

1 A contract of marine insurance is deemed to be concluded when the assured's proposal is accepted by the insurer, whether the policy is then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract: Marine Insurance Act 1906 s 21; see PARA 270 ante. See eg *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L Rep 75, HL; *Willmott v General Accident Fire and Life Assurance Corpn* (1935) 53 Ll L Rep 156.

2 Whether any particular circumstance which is not disclosed is or is not material is a question of fact: Marine Insurance Act 1906 s 18(4). See eg *Alluvials Mining Machinery Co v Stowe* (1922) 10 Ll L Rep 96; *Mathie v Argonaut Marine Insurance Co Ltd* (1925) 21 Ll L Rep 145, HL (deck cargo); *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103 (over-valued vessel); *Slattery v Mance* [1962] 1 QB 676, [1962] 1 All ER 525 (over-valued vessel); *Pacific Queen Fisheries v L Symes, The Pacific Queen* [1963] 2 Lloyd's Rep 201, US Ct of Apps (9th Circ) (vessel's gasoline carrying capacity); *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 (condition of goods on shipment); *James Yachts Ltd v Thames and Mersey Marine Insurance Co Ltd* [1977] 1 Lloyd's Rep 206, BC SC (use of boat yard); *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560 (condition of goods on shipment); *Allden v Raven, The Kylie* [1983] 2 Lloyd's Rep 444 (yacht built from kit); *Strive Shipping Corpn v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 All ER (Comm) 213, [2002] 2 Lloyd's Rep 88 (alleged scuttling). Further cases as to materiality, with regard to representations, are cited at para 409 note 2 post.

3 'Circumstance' includes any communication made to or information received by the assured: Marine Insurance Act 1906 s 18(5).

4 Ibid s 18(1). As regards the knowledge that the assured is deemed to have see PARA 395 post. The existence of an open cover does not relieve the assured from the duty to disclose material facts: *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442.

5 Marine Insurance Act 1906 s 18(2). A 'material circumstance' is one that would have an effect on the mind of the prudent insurer in estimating the risk and it is not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of premium demanded; however, before an underwriter can avoid a contract for non-disclosure of a material circumstance he has to show that he was actually induced by the non-disclosure to enter into the contract: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL, approving *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442; *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] All ER (Comm) 140, [2003] Lloyd's Rep IR 131. 'Material' is not limited to factors which might increase the risk: *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA, in which *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* supra was considered.

6 Marine Insurance Act 1906 s 18(1). See eg *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA (fraud of agent).

7 The excepted circumstances enumerated in the Marine Insurance Act 1906 s 18(3) are taken from the judgment of Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905 at 1910. As to these circumstances see further PARAS 401-407 post.

8 Marine Insurance Act 1906 s 18(3)(a). For the relationship between s 18(2) (see text and note 5 supra) and s 18(3)(a) see *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA.

9 Marine Insurance Act 1906 s 18(3)(b). The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know: s 18(3)(b). As to circumstances known to the insurer see further PARA 401 post.

10 Ibid s 18(3)(c). As to waiver see further PARA 402 post.

11 Ibid s 18(3)(d). As to information covered by warranty see further PARA 403 post.

12 Ie in heads (1)-(4) in the text: see text and notes 7-11 supra.

13 Marine Insurance Act 1906 s 19(a); see further PARA 396 post. An 'agent to insure' within s 19(a) means one who actually deals with the insurers and makes the contract in question and does not include intermediate agents: *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA.

14 Marine Insurance Act 1906 s 19(b). Where the assured is relieved of his duty to disclose by a term of the contract, this will not similarly relieve the agent of his duty to disclose: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

UPDATE

393 Duty of assured to disclose material facts

NOTE 4--As to the extent of the duty of disclosure where there is an open cover policy see *Glencore International AG v Alpina Insurance Co Ltd* [2003] EWHC 2792 (Comm), [2004] 1 All ER (Comm) 766.

NOTE 5--See *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 All ER (Comm) 613 (fact that shipment stated by insurer to contain clocks in fact contained high-value watches a material circumstance).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/394. Time of the conclusion of the contract is the material time.

394. Time of the conclusion of the contract is the material time.

The time for determining the materiality of a particular fact is the time of the conclusion of the contract and events which subsequently occur are not a relevant consideration¹. Neither the assured's failure to disclose a fact which only became known to him after the conclusion of the contract, nor a misrepresentation made by the assured after the conclusion of the contract, entitles the insurer to avoid the contract². If a statement made at the time of the policy is true, the fact that due to a change of plan on the part of the assured the statement subsequently becomes untrue does not entitle the insurer to avoid the policy, unless the change of plan is expressly prohibited by the contract³.

1 *Strive Shipping Corpn v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88; *Brotherton v Aseguradora Colseguros SA* [2003] All ER (D) 371 (Feb); and see PARA 397 post.

2 *Cory v Patton* (1872) LR 7 QB 304; *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179, Ex Ch; and see *Ionides v Pacific Insurance Co* (1871) LR 6 QB 674 (affd (1872) LR 7 QB 517, Ex Ch). The fact that the contract was concluded by the slip being initialled subject to ratification by the assured, and that the matter concealed came to his knowledge before the issue of the policy, makes no difference: *Cory v Patton* (1874) LR 9 QB 577, following *Hagedorn v Oliverson* (1814) 2 M & S 485. This accords with the Marine Insurance Act 1906 s 86: see PARA 388 ante. Where, however, a broker is instructed to effect a policy on goods and by mistake effects one on the ship, and the insurer afterwards agrees to a rectification of the policy, the broker is bound to disclose a material fact which has come to his knowledge between the execution of the policy and its rectification, for the insurer is under no obligation to make the alteration, and by doing so he is really making a new and distinct insurance: *Sawtell v Loudon* (1814) 5 Taunt 359. If, on the other hand, the policy does not correspond with the slip to which the insurer has assented, so that it is his duty to correct the error, the alteration does not make a new contract, but merely declares the true meaning of that already concluded, and there is no necessity to disclose the information acquired after the making of the contract: 2 Duer on Marine Insurance 428. It seems that if the contract is varied between the initialling of the slip and the issue of the policy, matters material to the variation, and those only, must be disclosed when the variation is made: see *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179 at 182, Ex Ch, per Blackburn J; and *Niger Co Ltd v Guardian Assurance Co Ltd* (1921) 6 Ll L Rep 239 at 250, CA, per Atkin LJ (on appeal (1922) 13 Ll L Rep 75 at 82, HL, per Lord Sumner). As to the insurance slip see PARA 270 ante.

3 *Willmott v General Accident Fire and Life Assurance Corpn Ltd* (1935) 53 Ll L Rep 156.

UPDATE

394 Time of the conclusion of the contract is the material time

NOTE 1--*Brotherton*, cited, reported at [2003] EWHC 335 (Comm), [2003] 1 All ER (Comm) 774, affirmed: [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/395. Circumstances deemed to be known by assured.

395. Circumstances deemed to be known by assured.

The insurer is entitled to assume as the basis of the contract between him and the assured that the assured will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge¹, and that he will take the necessary measures by the employment of competent and honest agents to obtain, through the ordinary channels of intelligence in use in the business world, all due information as to the subject matter of the insurance². This condition is not complied with where, by the fraud or negligence of an agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the insurer, and through that ignorance fails to disclose it³.

The master of a ship and the general agent of a shipowner for the transaction of his shipping business are agents whose knowledge will be imputed to the shipowner⁴; and, similarly, a factor employed to ship a cargo and forward the shipping documents, and the owner's general representative at a foreign port, are agents with whose knowledge the owner of cargo is affected⁵. Further, where the shipping agents of the assured knew that the bills of lading in respect of an insured cargo were subject to certain clauses, that knowledge was imputed to him⁶.

1 Marine Insurance Act 1906 s 18(1): see PARA 393 ante. The material facts are as to the subject matter, the ship and the perils to which the ship is exposed, but the assured's name need not be disclosed unless asked for: *Glasgow Assurance Corp'n Ltd v William Symondson & Co* (1911) 104 LT 254 at 257 per Scrutton J.

2 As to the subject matter of the insurance see PARA 217 ante.

3 *Proudfoot v Montefiore* (1867) LR 2 QB 511 at 521; *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531 at 540, 542, HL; *London General Insurance Co v General Marine Underwriters' Association* [1921] 1 KB 104. It is not 'in the ordinary course of business' for the assured to know of the dishonesty of an agent: *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA.

4 *Gladstone v King* (1813) 1 M & S 35; *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531 at 537, HL, per Lord Halsbury LC, and at 540 per Lord Watson.

5 *Fitzherbert v Mather* (1785) 1 Term Rep 12; *Proudfoot v Montefiore* (1867) LR 2 QB 511. As to the knowledge of a clerk of the assured being equivalent to that of the assured see *Stewart v Dunlop* (1785) 4 Bro Parl Cas 483, HL. It has already been noted (see PARA 24 ante) that Lloyd's agents are not the agents of the underwriters at Lloyd's: *Wilson v Salamandra Assurance Co of St Petersburg* (1903) 8 Com Cas 129.

6 *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442. As to bills of lading and the usual clauses contained in them see CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/396. Knowledge of agent effecting insurance.

396. Knowledge of agent effecting insurance.

Sometimes an agent employed to effect an insurance, instead of dealing with the insurer, acts through an intermediate agent or agents, and in these cases the non-disclosure of a material fact within the knowledge of any agent through whose agency, whether indirectly or directly, the insurance has been effected, avoids the policy¹.

Where, however, a broker who is employed to obtain an insurance on a particular risk fails to do so, and it is afterwards effected by another broker, the policy is not avoided by the non-disclosure of facts which were unknown to the principal and the second broker but were within the knowledge of the first, for the knowledge of the first broker cannot be imputed to the principal².

1 *Blackburn, Low & Co v Haslam* (1888) 21 QBD 144; see also *Lynch v Dunsford* (1811) 14 East 494, Ex Ch; Marine Insurance Act 1906 s 19 (see PARA 393 text and notes 12-14 ante); and see *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd*, *Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL.

2 *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531, HL. In *Gladstone v King* (1813) 1 M & S 35, and *Stribley v Imperial Marine Insurance Co* (1876) 1 QBD 507, it was decided that when an agent whose duty it is to keep his principal informed omits without fraud to inform him of an occurrence causing an average loss, and thereby prevents the principal from disclosing the occurrence, the insurance is not entirely avoided, and the only consequence is that the insurer is not liable for the average loss. These decisions, the principle of which it is not easy to understand, were disapproved of by Lord Halsbury LC and Lord Watson in *Blackburn, Low & Co v Vigors* supra, and there is little doubt that they are overruled by the Marine Insurance Act 1906 s 18(1) (see PARA 393 ante). In other respects s 18(1) summarises the effect of the cases cited in this note, in note 1 supra, and in PARA 395 notes 3-6 ante, in a single sentence.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/397. What circumstances are material.

397. What circumstances are material.

The assured is bound to disclose not only facts which are material to the risks considered in their own nature and which have a direct bearing on the extent of those risks, but also all circumstances which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk¹. Thus, the non-disclosure of the fact that the subject matter is excessively over-valued in the policy may be a ground for avoiding it².

The materiality of any particular circumstance is in no way determined or affected by events subsequent to the conclusion of the contract, and the insurance is therefore voidable although the information not disclosed turns out to be altogether untrue, or the loss to have arisen from a cause wholly different from and wholly unconnected with that referred to in the information or with any of the matters comprised in it. The only question is whether the circumstances or information not disclosed, whether by design or mistake, were such as would have influenced the judgment of a prudent insurer. Thus if, in proposing an insurance on goods on board a certain ship, the assured, having received information that the ship has met with an accident, fails to communicate the information to the insurer, the insurer will be discharged from liability, even if the omission is due to mere mistake or carelessness, and the information turns out in fact to have been wholly untrue, and even though the goods are lost by capture wholly unconnected with the perils of the seas³.

1 Marine Insurance Act 1906 s 18(1), (2); and see PARA 393 ante. See also *The Spathari* 1925 SC (HL) 6 (non-disclosure of Greek interest); *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, CA (unusual circumstances concerning pre-carriage of cargo); *James Yachts Ltd v Thames and Mersey Marine Insurance Co Ltd* [1977] 1 Lloyd's Rep 206, BC SC (non-disclosure of fact that permit for assured to carry on boat building business at his premises was refused by local authority, and of fact that he was impecunious); *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA (non-disclosure of nature of foundations for building); *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL (reinsurance: failure to disclose underwriting loss statistics). A clause providing that the assured is to be held covered at a premium to be arranged in the event of any incorrect definition of the interest insured will apply to an incorrect description of the subject matter insured, even though the misdescription amounts to nondisclosure of a material fact, provided the misdescription is not fraudulent: *Hewitt Bros v Wilson* [1915] 2 KB 739, CA. As to the duty to give notice to the insurer under this clause see PARA 324 note 3 ante.

2 *Ionides v Pender* (1874) LR 9 QB 531; *Rivaz v Gerussi Bros & Co and Gerussi* (1880) 6 QBD 222, CA; *Herring v Janson* (1895) 1 Com Cas 177; *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd*, *Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL (over-valuation and over-insurance: some of the policies by which over-insurance was effected were honour policies); *Gooding v White* (1913) 29 TLR 312; *Visscherij Maatschappij Nieuw Onderneming v Scottish Metropolitan Assurance Co Ltd* (1922) 27 Com Cas 198, CA; *Hoff Trading Co v Union Insurance Society of Canton Ltd* (1929) 45 TLR 466, CA; *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103 (progressive diminution in value of insured vessel); *Slattery v Mance* [1962] 1 QB 676, [1962] 1 All ER 525. It seems that over-insurance may be a material fact in the case of an unvalued policy: *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA. For the meaning of 'unvalued policy' see PARA 222 ante.

3 *Lynch v Hamilton* (1810) 3 Taunt 37 at 44 (affd sub nom *Lynch v Dunsford* (1811) 14 East 494, Ex Ch); *De Costa v Scandret* (1723) 2 P Wms 170; *Seaman v Fonereau* (1743) 2 Stra 1183; *Nicholson v Power* (1869) 20 LT 580; *Morrison v Universal Marine Insurance Co* (1872) LR 8 Exch 40 (revsd on other points (1873) LR 8 Exch 197, Ex Ch). Contrast *Strive Shipping Corp'n v Hellenic Mutual War Risks Association (Bermuda) Ltd*, *The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88; not followed in *Brotherton v Aseguradora Colseguros SA* [2003] All ER (D) 371 (Feb), and *Drake Insurance plc v Provident Insurance plc* [2003] EWHC 109 (Comm), [2003] All ER (D) 02 (Feb).

UPDATE

397 What circumstances are material

NOTE 3--*Brotherton*, cited, reported at [2003] EWHC 335 (Comm), [2003] 1 All ER (Comm) 774, affirmed: [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298. *Drake Insurance*, cited, reversed: [2003] EWCA Civ 1834, [2004] 2 WLR 530. See also *North Star Shipping Ltd v Sphere Drake Insurance plc (No 2)* [2006] EWCA Civ 378, [2006] 2 All ER (Comm) 65.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/398. The time of ship's sailing or being last heard of.

398. The time of ship's sailing or being last heard of.

The time of the ship's sailing or her being last heard of are facts as to which the assured may be bound to disclose his knowledge or information. Such disclosure is certainly necessary where it would lead to the inference that the ship is a missing or overdue vessel, and it may also be necessary in other cases where circumstances known to the assured exist which make those times material. The question in all cases is a question of fact¹, namely whether the circumstances known to the assured, or as to which he has information, regarding the time of a ship's sailing or when she was last heard of, would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk².

¹ Marine Insurance Act 1906 s 18(4); and see PARA 393 ante.

² The following are the principal cases relating to this subject, although they are of little modern use, not only because the question is one of fact depending on the particular circumstances of each case, but also because the changes in the course and mode of navigation, and the facilities of communication by way of radio or otherwise, are such as to prevent the earlier cases from being a safe guide as to inferences of fact: *Freeland v Glover* (1806) 7 East 457; *Elton v Larkins* (1832) 8 Bing 198 (subsequent proceedings 5 C & P 385); *Stribley v Imperial Marine Insurance Co* (1876) 1 QBD 507; *Ratcliffe v Shoolbred* (1780) 1 Park's Marine Insurances (8th Edn) 413; *M'Andrew v Bell* (1795) 1 Esp 373; *Webster v Foster* (1795) 1 Esp 407; *Willes v Glover* (1804) 1 Bos & PNR 14; *Mackintosh v Marshall* (1843) 11 M & W 116; *Bridges v Hunter* (1813) 1 M & S 15; *Foley v Moline* (1814) 5 Taunt 430; *Littledale v Dixon* (1805) 1 Bos & PNR 151; *Elkin v Janson* (1845) 13 M & W 655; *Rickards v Murdock* (1830) 10 B & C 527; *Westbury v Aberdein* (1837) 2 M & W 267; *Kirby v Smith* (1818) 1 B & Ald 672; *Bell v Bell* (1810) 2 Camp 475 at 479. As to cases involving the question whether when the old Convoy Acts were in force the assured was bound to disclose the fact that the ship sailed or was intended to sail without convoy see *Sawtell v Loudon* (1814) 5 Taunt 359; *Long v Duff*, *Long v Bolton* (1800) 2 Bos & P 209; *Reid & Co v Harvey* (1816) 4 Dow 97, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/399. Over-valuation as ground for avoiding the policy.

399. Over-valuation as ground for avoiding the policy.

As long as the contract of insurance is unimpeached, any agreed valuation is binding on the parties but over-valuation may be a ground for avoiding the contract. Thus, if the over-valuation is part of a scheme for defrauding the insurer, the policy will be voidable¹. Similarly an over-valuation made in order to cover a gambling transaction will avoid the whole contract; for instance where an insurance is effected for £20,000, and it is proved that the assured's interest amounted to the value of a cable only². Further, an over-valuation, whilst not fraudulent, may be so great as to constitute a material fact non-disclosure of which will entitle the insurer to avoid the policy³.

1 *Haigh v De la Cour* (1812) 3 Camp 319; *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442. See also the Marine Insurance Act 1906 s 27(3); and PARA 223 ante.

2 *Lewis v Rucker* (1761) 2 Burr 1167 at 1171.

3 *Ionides v Pender* (1874) LR 9 QB 531. See also the memorandum of Willes J, cited by Mathew J in *Herring v Janson* (1895) 1 Com Cas 177 at 178. Where the valuation is speculative, being based on mere future possibilities, this fact is material and must be disclosed: *Hoff Trading Co v Union Insurance Society of Canton Ltd* (1929) 45 TLR 466, CA; *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442; cf *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88, where the over-valuation of a ship was held to be justified and not ground for avoidance.

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399 Over-valuation as ground for avoiding the policy

NOTE 1--See also *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA* [2004] EWHC 15 (Comm), [2004] 1 All ER (Comm) 560.

NOTE 3--See also *North Star Shipping Ltd v Sphere Drake Insurance plc (No 2)* [2006] EWCA Civ 378, [2006] 2 All ER (Comm) 65.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/400. Materiality of special circumstances.

400. Materiality of special circumstances.

It is important to observe that, although the policy by its express terms may cover losses by all perils of the seas¹, this does not relieve the assured from the obligation to disclose information which he has received as to the insured vessel having encountered severe weather. Similarly, if a policy is on goods on board a certain vessel 'at and from port or ports of loading in the province of Buenos Aires', and the assured learns that the ship was intended to load at a roadstead then unknown to the insurer as a place of loading, the insurer will be discharged if the assured does not communicate the place of loading². If a ship is to be employed on a service of peculiar danger, or the subject matter insured is exposed to a particular and unusual risk, and this cannot be inferred from the terms of the policy, the fact ought to be communicated to the insurer³. Where goods are insured on 'ship or ships'⁴ and the assured knows that the goods are loaded on board a vessel which was reported in Lloyd's List as having met with an accident, the insurer may avoid liability if the assured has not disclosed to him the ship's name⁵. If the assured has entered into a contract which makes the measure of ultimate loss to the insurer greater than what is usual (for instance by reason of his right of subrogation being adversely affected), and he does not disclose the fact, this may amount to non-disclosure of a material fact and the insurer may avoid the policy⁶.

Moreover, if the assured has private information of any trade regulation recently introduced or of any particular danger affecting the risk insured, and which in the ordinary course of business would not be known to the insurer, the non-disclosure of that information would be a ground for avoiding the policy⁷. The assured cannot excuse his omission to communicate a material fact on the ground that it had previously come to the insurer's knowledge, unless at the time when the contract was made the fact was present to the insurer's mind⁸.

1 For the meaning of 'perils of the seas' see PARA 332 ante.

2 *Harrower v Hutchinson* (1870) LR 5 QB 584, Ex Ch; *Laing v Union Marine Insurance Co Ltd*, *Laing v London Assurance Corp*n (1895) 1 Com Cas 11.

3 *T Cheshire & Co v Thompson* (1919) 24 Com Cas 114; affd 24 Com Cas 198, CA.

4 See PARA 290 note 2 ante.

5 *Lynch v Hamilton* (1810) 3 Taunt 37 (affd sub nom *Lynch v Dunsford* (1811) 14 East 494, Ex Ch); *Leigh v Adams* (1871) 25 LT 566.

6 *Tate v Hyslop* (1885) 15 QBD 368, CA, which might also have been decided on the ground that there was a misrepresentation. In a case of insurance in freight (see PARA 296 ante) the fact that the assured has contracted that the vessel should be ready to load by a given date may be material: *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51 at 70.

7 *Carter v Boehm* (1766) 3 Burr 1905 at 1915; *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, CA.

8 *Bates v Hewitt* (1867) LR 2 QB 595 (distinguished on the facts); *Gandy v Adelaide Insurance Co* (1871) LR 6 QB 746 at 755; *Fracis, Times & Co v Sea Insurance Co* (1898) 3 Com Cas 229 (where a trade prohibition was habitually ignored); *London General Insurance Co v General Marine Underwriters' Association* [1921] 1 KB 104.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/401. Matters which need not be disclosed.

401. Matters which need not be disclosed.

There are certain circumstances which, by statute, need not be disclosed in the absence of inquiry¹. Thus the insurer has no ground of complaint because he is not informed of a circumstance which diminishes the risk². Nor is the assured bound to disclose any circumstance which is known or presumed to be known by the insurer³. Further, the assured need not mention general topics of speculation, or matters involving natural or political perils, such as the difficulty of the voyage, the probability of hurricanes, earthquakes, war or embargo and the like, or the established trade regulations of governments⁴.

1 See the Marine Insurance Act 1906 s 18(3); and PARA 393 ante.

2 Ibid s 18(3)(a); see PARA 393 ante. Although a circumstance which diminishes the risk need not be disclosed under s 18(3)(a) it may still be material within the meaning of s 18(2): *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA; see PARA 397 ante.

3 Marine Insurance Act 1906 s 18(3)(b). See also *Foley v Tabor* (1861) 2 F & F 663 at 672 per Erle CJ.

4 *Carter v Boehm* (1766) 3 Burr 1905; *Bolivia Republic v Indemnity Mutual Marine Assurance Co Ltd* (1908) 99 LT 394; *Cantiere Meccanico Brindisino v Janson* (1912) 107 LT 281, CA; *London General Insurance Co Ltd v General Marine Underwriters' Association Ltd* (1920) 124 LT 67, CA; *North British Fishing Boat Insurance Co Ltd v Starr* (1922) 13 Ll L Rep 206; *George Cohen, Sons & Co v Standard Marine Insurance Co Ltd* (1925) 21 Ll L Rep 30; *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103; *St Margaret's Trust Ltd v Navigators and General Marine Insurance Co Ltd* (1949) 82 Ll L Rep 752; *Pacific Queen Fisheries v L Symes, The Pacific Queen* [1963] 2 Lloyd's Rep 201, US Ct of Apps (9th Circ); *Soya GmbH Mainz Kommanditgesellschaft v White* [1982] 1 Lloyd's Rep 136, CA; and see cases cited in PARAS 402 note 2, and 403-404 post; and cf para 400 text and notes 7-8 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/402. Information waived by the insurer.

402. Information waived by the insurer.

The assured is not bound to disclose any information which is waived by the insurer¹. In general, where from the facts communicated to him the insurer would naturally infer the existence of other facts not disclosed, his omission to make inquiry is an implied waiver of a more explicit disclosure. Thus, where an insurance is applied for in time of war on a cruiser 'from places to places' without any limitation or description, the insurer must know from the terms of the proposed insurance that the ship is to be employed in some warlike expedition, and hence, if he omits to inquire, the particular nature of the service in which she is to be employed need not be disclosed to him².

The omission to make inquiry is no waiver if the insurer is not put on inquiry; waiver is not to be easily presumed³.

¹ Marine Insurance Act 1906 s 18(3)(c); see PARA 393 ante.

² *Carter v Boehm* (1766) 3 Burr 1905 per Lord Mansfield CJ; *Asfar & Co v Blundell* [1896] 1 QB 123 at 129, CA. As illustrations of the same principle see *Beckwith v Sydebotham* (1807) 1 Camp 116; *Fort v Lee* (1811) 3 Taunt 381; *Freeland v Glover* (1806) 7 East 457; *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452, CA; *Property Insurance Co Ltd v National Protector Insurance Co Ltd* (1913) 18 Com Cas 119; *Mann Macneal and Steeves Ltd v Capital and Counties Insurance Co Ltd* [1921] 2 KB 300, CA (distinguished in *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, CA); *Pacific Queen Fisheries v L Symes, The Pacific Queen* [1963] 2 Lloyd's Rep 201, US Ct of Apps (9th Circ); *Gulfstream Cargo Ltd v Reliance Insurance Co, The Papoose* [1971] 1 Lloyd's Rep 178; *Allden v Raven, The Kylie* [1983] 2 Lloyd's Rep 444; *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, CA. The insurer's practice as to accepting risks or not making inquiries on particular points cannot affect the statutory duty or be received as evidence of waiver in any particular case: *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd, Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL, per Lord Alverstone CJ.

³ *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, CA.

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402 Information waived by the insurer

NOTE 3--See *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 All ER (Comm) 613.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/403. Information the subject of a warranty.

403. Information the subject of a warranty.

In the absence of inquiry the assured need not disclose that which it is superfluous to disclose by reason of any express or implied warranty¹. Thus, in the case of a voyage policy², the assured need not make any disclosure of information relating to the ship's unseaworthiness when she sailed, because if she did not start on her voyage in a seaworthy condition, the insurer would not be liable³. It is, however, otherwise in the case of a time policy⁴, where there is no implied warranty of seaworthiness⁵.

1 Marine Insurance Act 1906 s 18(3)(d); see PARA 393 ante.

2 For the meaning of 'voyage policy' see PARA 222 ante.

3 *Schoonbred v Nutt* (1782) 1 Park's Marine Insurances (8th Edn) 493; *Haywood v Rodgers* (1804) 4 East 590; *Beckwith v Sydebotham* (1807) 1 Camp 116; *Gunford Ship Co Ltd v Thames and Mersey Marine Insurance Co Ltd* 1910 SC 1072 (revsd, but not on this point, sub nom *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd*, *Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL) (qualification of master; it was held that neither his name nor his previous history were in ordinary circumstances, or in the circumstances of that case, material to be disclosed). In *Boyd v Dubois* (1811) 3 Camp 133 the insurers claimed to avoid the policy, which was on cargo, on the ground that the fact that the cargo had been damaged had not been disclosed to them. Lord Ellenborough CJ said that the assured was 'not bound to represent to the underwriter the state of the goods'. This observation was doubted in *Carr v Montefiore* (1864) 5 B & S 408 at 423, and cannot now be regarded as authority for the general proposition that a person insuring cargo is never bound to disclose the condition of the goods; see *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, CA. Probably the true view is that any unusual circumstances relating to the cargo must be disclosed, but that the assured is not bound to point out to the insurer the consequences which naturally follow from the facts which he discloses unless the insurer inquires as to those consequences: *Greenhill v Federal Insurance Co Ltd* supra at 84 per Scrutton LJ; and see *Cantiere Meccanico Brindisino v Janson* [1912] 2 KB 112 at 115 per Scrutton J (affd [1912] 3 KB 452, CA).

4 For the meaning of 'time policy' see PARA 222 ante.

5 *Russell v Thornton* (1859) 4 H & N 788. As to the warranty of seaworthiness see PARA 245 et seq ante; and as to the absence of such a warranty in a time policy see PARA 255 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/404. Further matters which need not be disclosed.

404. Further matters which need not be disclosed.

The assured is not bound to disclose the estimate formed by other insurers of the risk or the fact that they have declined it¹. Where a fact is a matter of inference and the materials for drawing it are common to both parties, the assured is generally not bound to make any communication on the subject². It must, however, be always borne in mind that the question whether any particular information which is not disclosed is or is not material, or whether the insurer has waived the disclosure, are questions of fact, and that therefore the decision in each case must depend upon its particular circumstances³. For instance, the payment of a very high premium may be evidence that the insurer accepted the risk and waived the disclosure of a particular matter⁴.

1 *Lebon & Co v Straits Insurance Co* (1894) 10 TLR 517, CA; *Glasgow Assurance Corpn Ltd v William Symondson & Co* (1911) 16 Com Cas 109 at 119. The rule that refusals by other insurers need not be disclosed appears to be peculiar to marine insurance: see *London Assurance v Mansel* (1879) 11 ChD 363 at 370; *Re Yager and Guardian Assurance Co* (1912) 108 LT 38, DC. As to the position in non-marine insurance see PARA 40 ante. It was held by Lord Ellenborough CJ in *Bell v Bell* (1810) 2 Camp 475 at 479, that the assured need not communicate the apprehensions or opinions of foreign correspondents, and that it was enough for him to state the facts on which they were founded.

2 *Bates v Hewitt* (1867) LR 2 QB 595 at 605 per Cockburn CJ; *Gandy v Adelaide Insurance Co* (1871) LR 6 QB 746; *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452, CA.

3 See PARA 393 ante.

4 *Court v Martineau* (1782) 3 Doug KB 161.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/405. Matters contained in Lloyd's List.

405. Matters contained in Lloyd's List.

An underwriter who is a member of Lloyd's or a subscriber, and as such receives or has access to Lloyd's List, is not conclusively presumed to have knowledge of the contents of the List. Therefore, the insurance will be voidable if there has been a failure to disclose a material circumstance to the underwriter, even though it is recorded in the List, if in fact he is proved not to have been aware of it at the time of concluding the contract¹. This rule applies also where there has been any false representation made to the underwriter as to the nature of the risk and he acted solely in reliance on the representation without in fact consulting Lloyd's List².

¹ *Morrison v Universal Marine Insurance Co* (1872) LR 8 Exch 40 at 54 per Bramwell B (revsd on grounds not affecting this question (1873) LR 8 Exch 197); *Elton v Larkins* (1832) 8 Bing 198 (on second trial 5 C & P 385); *Nicholson v Power* (1869) 20 LT 580 per Cockburn CJ; *Mackintosh v Marshall* (1843) 11 M & W 116. It seems that *Friere v Woodhouse* (1817) Holt NP 572, a decision contrary to what is stated in the text, can no longer be relied on as authority; see also *Lynch v Dunsford* (1811) 14 East 494, Ex Ch; *Foley v Tabor* (1861) 2 F & F 663 at 672 per Erle CJ; *Gandy v Adelaide Insurance Co* (1871) LR 6 QB 746 at 754 (where the underwriter did refer to the register, but failed to draw the correct inference); *London General Insurance Co v General Marine Underwriters' Association* [1921] 1 KB 104, applying *Bates v Hewitt* (1867) LR 2 QB 595.

² *Mackintosh v Marshall* (1843) 11 M & W 116.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/406. Evidence of insurers and brokers as to materiality.

406. Evidence of insurers and brokers as to materiality.

Although it was once doubtful whether the evidence of insurers and insurance brokers was admissible to prove the materiality of the representation made, or of the circumstances not disclosed¹, it has become the established practice to admit such evidence². Evidence is also required to demonstrate that the material circumstance induced the insurer to enter the contract³.

¹ The evidence was held to be inadmissible in *Carter v Boehm* (1766) 3 Burr 1905, but was admitted in *Littledale v Dixon* (1805) 1 Bos & PNR 151; *Chaurand v Angerstein* (1791) Peake 43; *Campbell v Rickards* (1833) 5 B & Ad 840; *Berthon v Loughman* (1817) 2 Stark 258; *Rickards v Murdock* (1830) 10 B & C 527; and *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd, Southern Marine Mutual Insurance Association v Gunford Ship Co Ltd* [1911] AC 529, HL; and see *Chapman v Walton* (1833) 10 Bing 57 at 65. As to the admissibility of the evidence of experts generally see CIVIL PROCEDURE vol 11 (2009) PARAS 835-837.

² *Ionides v Pender* (1874) LR 9 QB 531; *Herring v Janson* (1895) 1 Com Cas 177 at 179; and see *Bates v Hewitt* (1867) LR 2 QB 595 at 610; *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51 at 70 per Hamilton J. The court may, however, take judicial notice of the materiality of the fact without evidence being given: see *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593 at 609, CA, per Scrutton LJ; affd [1927] AC 139, HL. On the other hand, the evidence may prove that although the facts which were not disclosed increased the risk, a prudent insurer would not have appreciated the bearing of these facts on the risk. If so, the court must find that the facts in question were not material within the meaning of the Marine Insurance Act 1906 s 18(2) (see PARA 393 ante), and consequently that the assured was under no obligation to disclose them: *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184. As to the onus of proof on the issue of non-disclosure see PARA 391 note 2 ante.

³ *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] Lloyd's Rep IR 131; *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA (where three of the four underwriters involved gave evidence the court held, in respect of the fourth who did not, that there was a presumption of inducement on his part which the assured had not rebutted). As to inducement see PARA 393 note 5 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(i) Fraud, Concealment or Non-disclosure/407. Insurer presumed to know the usage of the trade.

407. Insurer presumed to know the usage of the trade.

The assured is entitled to assume that the insurer is acquainted with the general usage of the trade to which the insured adventure relates, and therefore need not communicate to the insurer facts as to that usage¹. Moreover, where there is a general and notorious practice to insert a certain clause in a particular kind of commercial contract, the assured is entitled to assume that the insurer knows that the contract may contain that clause, and therefore need not inform him that it does, even if the clause may tend to increase the risk².

¹ Marine Insurance Act 1906 s 18(3)(b) (see PARA 393 ante); *Vallance v Dewar* (1808) 1 Camp 503; *Ougier v Jennings* (1800) 1 Camp 504n; *Kingston v Knibbs* (1808) 1 Camp 508n; *Salvador v Hopkins* (1765) 3 Burr 1707; *Freeland v Glover* (1806) 7 East 457; *Da Costa v Edmunds* (1815) 4 Camp 142; *Stewart v Bell* (1821) 5 B & Ald 238. As to incorporation of usage in the policy see PARAS 232-234 ante. Cf *Tennant v Henderson* (1813) 1 Dow 324, HL, where the usage alleged was not established.

² *Salvador v Hopkins* (1765) 3 Burr 1707; *The Bedouin* [1894] P 1, CA; *Asfar & Co v Blundell* [1896] 1 QB 123, CA; *Charlesworth v Faber* (1900) 5 Com Cas 408.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/408. Representations during negotiation of contract.

(ii) Misrepresentation

408. Representations during negotiation of contract.

Every material representation¹ made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true; if it is untrue, the insurer may avoid the contract². A representation is an oral or written statement made by the assured or his agent before or at the time of the making of the contract, and it generally consists of oral communications made, or written instructions shown, by the broker to the insurer³. The main distinction in form between a representation and an express warranty is that a representation may be made either orally or in writing and need not be included in the policy, whereas an express warranty must always be included in or written on the policy, or must be contained in some document incorporated by reference into it⁴.

There are two other distinctions between a warranty and a representation which it is important to notice. A breach of warranty will discharge the insurer even if it does not relate to a matter material to the risk insured against; and a warranty must be exactly complied with⁵. On the other hand, a misrepresentation which is not material will not enable the insurer to avoid the policy; nor will he be able to do so if the representation is substantially correct, that is to say if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer⁶.

1 As to when a representation is material see PARA 409 post.

2 Marine Insurance Act 1906 s 20(1).

3 Arnould on Marine Insurance (16th Edn) s 589.

4 Marine Insurance Act 1906 s 35(2). As to express warranties see PARAS 238-244 ante. As to misrepresentation generally see MISREPRESENTATION AND FRAUD.

5 See PARA 236 ante.

6 See the Marine Insurance Act 1906 s 20(4); and PARA 409 post. See *Pawson v Watson* (1778) 2 Cowp 785 at 787 per Lord Mansfield CJ; *Von Tungeln v Dubois* (1809) 2 Camp 151; *Nonnen v Reid*, *Nonnen v Kettlewell* (1812) 16 East 176 at 186. It will be observed that a 'warranty' in this branch of the law of marine insurance is equivalent to a 'condition' in the general law of contract: see PARA 235 note 2 ante. See also CONTRACT vol 9(1) (Reissue) PARA 993.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/409. Material representations: fact or belief: absence of fraud.

409. Material representations: fact or belief: absence of fraud.

A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk¹. Whether or not the representation is material is in each case a question of fact².

A representation may be a representation either as to a matter of fact or as to a matter of expectation or belief³. If it is as to a matter of fact, it is true if it is substantially correct, that is to say if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer⁴. If it is as to a matter of expectation or belief, it is true if made in good faith⁵. A representation may be withdrawn or corrected before the contract is concluded⁶.

It is not necessary that a representation should be fraudulent in order to avoid the insurance; a representation, if material, even though wholly untainted with fraud, will also enable the insurer to avoid liability unless the representation is substantially correct or unless he knew the truth at the time the contract was concluded.

It is, however, only a material representation as already defined⁷ which will entitle the insurer to avoid the contract, and all that has been said⁸ concerning materiality in connection with the duty to disclose material circumstances to the insurer applies to representations made to him. Thus it is not necessary in order to avoid the policy on the ground of misrepresentation that the loss should have arisen from a cause in any way connected with the circumstances or matters represented, the only question being whether the representation was material in the sense previously mentioned⁹. As in the case of non-disclosure, a representation may be material even if it does not relate directly to the risks insured against¹⁰.

1 Marine Insurance Act 1906 s 20(2).

2 Ibid s 20(7). See eg *Cantiere Maccanico Brindisino v Janson* [1912] 3 KB 452, CA; *Hamilton & Co v Eagle Star and British Dominions Insurance Co Ltd* (1924) 19 Ll L Rep 242; *Demetriades & Co v Northern Assurance Co* (1925) 21 Ll L Rep 265, HL; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA; *Neue Fischmehl Vertriebs-Gesellschaft Haselhorst mbH v Yorkshire Insurance Co Ltd* (1934) 50 Ll L Rep 151; *Willmott v General Accident Fire and Life Assurance Corp'n Ltd* (1935) 53 Ll L Rep 156; *Slattery v Mance* [1962] 1 QB 676, [1962] 1 All ER 525; *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560; *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, CA; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL.

3 Marine Insurance Act 1906 s 20(3).

4 Ibid s 20(4).

5 Ibid s 20(5).

6 Ibid s 20(6). The time of conclusion of the contract is defined by s 21: see PARAS 270, 393 note 1 ante.

7 See the Marine Insurance Act 1906 s 20(2): and text and note 1 supra.

8 See PARA 397 ante.

9 Marine Insurance Act 1906 s 20(1), (2); *Lynch v Dunsford* (1811) 14 East 494, Ex Ch; and see the cases cited in PARAS 397 notes 1, 3, 398 note 2 ante.

10 *The Spathari* 1925 SC (HL) 6, where a representation that the vessel was entitled to be registered as British was held to be material.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/410. Representations of expectation or belief.

410. Representations of expectation or belief.

Where a representation is as to a matter of expectation or belief, it is deemed true if it is made in good faith¹. Where the assured, with intention to deceive the insurer, states his belief or expectation as to matters of which he is ignorant, the representation cannot be considered as made in good faith and the insurance may, therefore, be avoided².

¹ See the Marine Insurance Act 1906 s 20(5); and PARA 409 ante.

² See *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 481, CA, per Bowen LJ; *Derry v Peek* (1889) 14 App Cas 337 HL; *Pawson v Watson* (1778) 2 Cowp 785 at 788 per Lord Mansfield CJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/411. Promissory representations.

411. Promissory representations.

Before the Marine Insurance Act 1906, a statement made before or at the time of the conclusion of the contract that a certain fact or state of things 'shall' or 'will' thereafter exist was held to amount to a representation which, if not substantially complied with, avoided the policy even if the representation was made without fraud¹. It was laid down in later decisions, however, as a principle of the law of contract in general, that a representation of a future fact, if binding at all, can only be binding as a contract or promise². It is submitted that this view is adopted in the provisions of the Act³ and consequently that promissory representations of future facts cannot be considered as representations within the meaning of the Act. If this view is correct, it follows that the non-fulfilment of 'promissory representations' (as distinct from warranties⁴) will not of itself entitle the insurer to avoid the contract. A promissory representation, however, usually implies the further representation of expectation or belief that the representation will be fulfilled. If this further representation is untrue⁵, the insurer may avoid the contract⁶.

1 *Pawson v Watson* (1778) 2 Cowp 785; *Dennistoun v Lillie* (1821) 3 Bli 202, HL.

2 *Jorden v Money* (1854) 5 HL Cas 185; *Maddison v Alderson* (1883) 8 App Cas 467 at 473, HL; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352 at 360; and see *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 804 per Mellish LJ; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 703 et seq.

3 Ie the Marine Insurance Act 1906 s 20(4); see PARA 409 ante.

4 As to warranties see PARA 235 et seq ante.

5 As to when a representation as to a matter of expectation or belief is true see PARA 410 ante.

6 See PARAS 408-409 ante; and see also the discussion of this question in Arnould on Marine Insurance (16th Edn) ss 601-604.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/412. Representation concerning information received by assured.

412. Representation concerning information received by assured.

The fact represented by the assured may be a statement that he has received certain information; if he merely submits the information to the insurer, leaving him to draw his own conclusions from it, there is no untrue representation, and the insurer cannot avoid the policy even if the information proves to be incorrect¹.

¹ 2 Duer on Marine Insurance 703; *Brine v Featherstone* (1813) 4 Taunt 869. Where, however, the information communicated to the insurer purports to come from an agent of the assured whose duty it is to supply him with correct intelligence in relation to the subject insured, the incorrectness of the information may enable the insurer to avoid liability: *Fitzherbert v Mather* (1785) 1 Term Rep 12.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/413. Representations made in answer to inquiry.

413. Representations made in answer to inquiry.

Where a representation has been made in answer to an inquiry by the insurer, the assured has had notice that the answer would influence the insurer in taking the risk, and therefore the strongest presumption exists that the matter inquired into was material to be known by the insurer, and any untrue answer will probably entitle him to avoid the policy¹.

¹ See *The Bedouin* [1894] P 1 at 12, CA, per Lord Esher MR. If the answer is known by the assured to be false, the insurer can, of course, avoid the policy irrespective of the materiality of the answer: *The Bedouin* supra at 12.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/414. Misrepresentation involves non-disclosure.

414. Misrepresentation involves non-disclosure.

Failure to disclose a material fact may virtually amount to a representation that the fact does not exist, and every misrepresentation clearly involves non-disclosure of the truth. It consequently follows that some cases in which it was held that the policy was avoided by misrepresentation might have been decided also on the ground that there was non-disclosure of a material fact, and vice versa¹.

¹ *Fitzherbert v Mather* (1785) 1 Term Rep 12; *Tate v Hyslop* (1885) 15 QBD 368, CA; *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA; *HIH Casualty and General Insurance Co v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/415. Representations to one of several insurers.

415. Representations to one of several insurers.

Where there are several insurers, a representation to the first has been considered virtually a representation to all, with the result that each subsequent insurer, when it proved to be false, might avoid the contract on this ground, as it has been presumed that the subsequent insurers subscribed the policy on the faith reposed by them in the skill and judgment of the first¹. The correctness of this rule has, however, been strongly questioned² and it is submitted that it can no longer be considered to be a correct statement of the law. However, it has more recently been held that the fact that a false statement has been made to an underwriter is a material fact, so that if later underwriters are not informed of that fact they have the right to avoid their subscription for non-disclosure³, although probably only if the insured or the broker was aware that a false statement had earlier been made.

1 *Pawson v Watson* (1778) 2 Cowp 785; *Barber v Fletcher* (1779) 1 Doug KB 305; *Stackpole v Simon* (1779) 2 Park's Marine Insurances (8th Edn) 932 (life policy); *Marsden v Reid* (1803) 3 East 572 at 573; *Feise v Parkinson* (1812) 4 Taunt 640.

2 *General Accident Fire and Life Assurance Corp'n v Tanter, The Zephyr* [1985] 2 Lloyd's Rep 529 at 539, CA, per Mustill LJ; *Bank Leumi Le Israel BM v British National Insurance Co Ltd* [1988] 1 Lloyd's Rep 71 at 77 per Saville J; see also *Brine v Featherstone* (1813) 4 Taunt 869; *Forrester v Pigou* (1813) 1 M & S 9 at 13, per Lord Ellenborough. It is not extended to representations to later insurers: *Bell v Carstairs* (1810) 2 Camp 543; *Brine v Featherstone* supra; *Marsden v Reid* (1803) 3 East 572.

3 *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins* [1998] 1 Lloyd's Rep 565 (affd [2001] UKHL 51, [2001] 2 All ER (Comm) 929, [2002] 1 Lloyd's Rep 157); *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep IR 237. Contrast *Sirius International Insurance Corp'n v Oriental Insurance Corp'n* [1999] Lloyd's Rep IR 343.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/416. Construction of representations.

416. Construction of representations.

The construction of representations is governed by the ordinary rules applicable to the interpretation of clauses in a policy¹.

¹ *Chaurand v Angerstein* (1791) Peake 43; *Freeland v Glover* (1806) 7 East 457 at 462; *Kirby v Smith* (1818) 1 B & Ald 672 at 675. As to the construction of marine insurance policies see PARA 226 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(ii) Misrepresentation/417. Effect of decided cases on materiality.

417. Effect of decided cases on materiality.

There are two points which must always be borne in mind in dealing with the numerous cases that have been decided on the subject of non-disclosure of material circumstances and material representations¹. The first is that, as the materiality of matters not disclosed or of representations made is a question of fact² and not of law, each case must be decided on its own particular facts. The second is that, in earlier times when the parties to a contract were not allowed to give evidence, the courts were obliged in many cases to raise presumptions of fact and to act on them, but now that the parties can be examined and cross-examined it is in almost all cases unnecessary to have recourse to any such presumptions.

1 See PARAS 393-416 ante.

2 Marine Insurance Act 1906 s 20(7); see PARA 409 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(iii) Election to Avoid, and Cancellation of, Policies/418. When election to avoid the contract must be made.

(iii) Election to Avoid, and Cancellation of, Policies

418. When election to avoid the contract must be made.

Where the contract of insurance is voidable on the ground of misrepresentation¹ or non-disclosure² on the assured's part, it may be important, in certain circumstances, for the assured to know whether the insurer elects to avoid the contract, in order that he may be able to take steps to effect another insurance. The fact that the insurer has subscribed a policy without protest does not, however, prove that he has elected to affirm the contract, inasmuch as he may have acted in pursuance of the usage which binds the insurer to subscribe a policy in accordance with the slip³.

Even when the insurer has full knowledge of the facts, he is still entitled to a reasonable time in which to decide whether to affirm or repudiate the contract⁴. If he has taken no action to affirm or repudiate it and a reasonable time for making up his mind has elapsed, he will be deemed to have affirmed the contract if either so much time has elapsed that the necessary inference is one of affirmation or the assured has been prejudiced by the delay in making an election or rights of third parties have intervened⁵.

1 As to avoidance on the ground of misrepresentation see PARA 408 et seq ante.

2 As to avoidance on the ground of non-disclosure see PARA 390 et seq ante.

3 As to this usage see PARA 270 ante.

4 A defendant will have affirmed the contract if (1) with knowledge of the facts giving rise to a right of avoidance for misrepresentation or non-disclosure; and (2) possibly with the knowledge of the right of avoidance itself, he acts in a way which is only consistent with an intention not to treat the contract as at an end. Invoking or asserting a contractual right is a clear example of electing not to treat the contract as at an end: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep 101 at 108 per Waller J; affd [1993] 1 Lloyd's Rep 486, CA; and on other grounds [1995] 1 AC 501, [1994] 3 All ER 581, HL.

5 *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560 at 565 per Donaldson J. See also *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep 101; affd [1993] 1 Lloyd's Rep 486, CA; and on other grounds [1995] 1 AC 501, [1994] 3 All ER 581, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(9) AVOIDANCE OF POLICY/(iii) Election to Avoid, and Cancellation of, Policies/419. Cancellation of policies.

419. Cancellation of policies.

Where a policy is avoided for non-disclosure or misrepresentation, it may be ordered to be given up and cancelled¹.

¹ *Rivaz v Gerussi Bros & Co and Gerussi* (1880) 6 QBD 222, CA; *Brooking v Maudslay, Son and Field* (1888) 38 ChD 636. See also EQUITY; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1035 et seq; MISREPRESENTATION AND FRAUD. As to avoidance on the ground of non-disclosure see PARA 390 et seq ante; as to avoidance on the ground of misrepresentation see PARA 408 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/420. General average loss and right to contribution.

(10) GENERAL AVERAGE

(i) General Average Loss and General Average Contribution

420. General average loss and right to contribution.

A general average¹ loss is a loss caused by or directly consequential on a general average act, and it includes a general average expenditure as well as a general average sacrifice². There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril³ for the purpose of preserving the property imperilled in the common adventure⁴.

Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law⁵, to a rateable contribution from the other parties interested, and such a contribution is called a general average contribution⁶.

The question what does or does not constitute a general average loss⁷ does not directly concern marine insurance law, which is more relevant to determine when and to what extent the insurer is liable in respect of a general average loss or contribution⁸.

1 For a consideration of the derivation and meaning of 'average' see *Kelman v Livanos* [1955] 2 All ER 236 at 239, [1955] 1 WLR 590 at 598-599 per McNair J; and see PARA 422 post.

2 Marine Insurance Act 1906 s 66(1).

3 le at a time when a peril really exists; it is not enough that a peril is reasonably believed to exist: *Joseph Watson & Son Ltd v Firemen's Fund Insurance Co of San Francisco* [1922] 2 KB 355.

4 Marine Insurance Act 1906 s 66(2).

5 As to these conditions see PARA 425 post.

6 Marine Insurance Act 1906 s 66(3). These provisions mainly embody the principles laid down by Lawrence J in *Birkley v Presgrave* (1801) 1 East 220 at 228, and also in the judgments in *Svensden v Wallace* (1884) 13 QBD 69, CA (affd (1885) 10 App Cas 404, HL). The law of general average, which owes its origin to the Rhodian laws, was incorporated in the Roman law and afterwards in the common law, and it may therefore now be considered as implied in the contract of affreightment. On this point see *Burton v English* (1883) 12 QBD 218 at 223, CA; and *Wright v Marwood* (1881) 7 QBD 62, CA.

7 For a full discussion of this question see CARRIAGE AND CARRIERS vol 7 (2008) PARA 605 et seq. It is sufficient here to notice (see PARA 421 post) some of the more important consequences of the statutory definitions stated in the text to notes 2-6 supra.

8 See PARAS 426-427 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/421. General average expenditure.

421. General average expenditure.

An expenditure caused by or directly consequential on a general average act is called a general average expenditure, for that expenditure may properly be considered as the cost of the general average act¹. If at the time of peril salvors are employed at a certain remuneration to save the whole of the property at risk², or if money is paid to pirates for the purpose of saving both ship and cargo, this expenditure constitutes a general average expenditure³. Again, where a vessel puts into a port of refuge for her own safety and that of the cargo on board her, the inward expenses, including the charges for towage, pilotage, harbour dues etc, are general average expenditure, inasmuch as they are the direct consequences of the general average act of putting into port⁴. Further, expenditure reasonably incurred in defending an action for an indemnity arising out of a general average act is directly consequential on that act⁵.

1 Marine Insurance Act 1906 s 66(2): see PARA 420 ante.

2 *Ocean Steamship Co v Anderson* (1883) 13 QBD 651, CA (revsd, without affecting the principle, sub nom *Anderson v Ocean Steamship Co* (1884) 10 App Cas 107, HL); *Kemp v Halliday* (1866) LR 1 QB 520, Ex Ch. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 614.

3 Marshall on Marine Insurance (4th Edn) 424.

4 See *Svensden v Wallace* (1884) 13 QBD 69, CA (affd (1885) 10 App Cas 404, HL); cf *Trade Green Shipping Inc v Securitas Bremer Allgemeine Versicherungs AG* [2001] 1 All ER (Comm) 1097, [2000] 2 Lloyd's Rep 451.

5 *Australian Coastal Shipping Commission v Green* [1971] 1 QB 456, [1971] 1 All ER 353, CA (contract of towage). For the meaning of 'general average act' see PARA 420 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/422. General and particular average losses distinguished.

422. General and particular average losses distinguished.

A general average loss differs essentially from a particular average loss. A general average loss is a loss voluntarily incurred for the common safety, and therefore made good by a rateable contribution from all the parties concerned in the adventure, whereas a particular average loss is a loss fortuitously caused by a maritime peril¹, and has to be borne by the party on whom the loss originally fell². In complex salvage operations the whole of the expenditure may be incurred for the common safety³, or part may be incurred for the common safety and part for the benefit of particular interests⁴, and expenditure may be of a general average nature as regards two or more interests but be particular average as regards a further interest⁵. Broadly, once an interest has reached a place of safety, expenditure incurred on it cannot be general average expenditure so far as that interest is concerned.

1 For the meaning of 'maritime perils' see PARA 217 ante.

2 *Nesbitt v Lushington* (1792) 4 Term Rep 783; and see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 605-607.

3 *Moran v Jones* (1857) 7 E & B 523; *Kemp v Halliday* (1866) 6 B & S 723.

4 *Job v Langton* (1856) 6 E & B 779; *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362, DC.

5 *Royal Mail Steam Packet Co v English Bank of Rio de Janeiro* (1887) 19 QBD 362, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/423. Sacrifice or expenditure involved must be extraordinary.

423. Sacrifice or expenditure involved must be extraordinary.

No claim for general average contribution can be sustained unless the sacrifice or expenditure out of which it arises is of an extraordinary nature, or unless the expenditure is directly occasioned by a general average act. The shipowner agrees by the contract of affreightment to give the use of his vessel, with all her appliances, as well as the services of the crew, to the shippers or charterers for the entire voyage. For what he does in performance of that obligation he has, in general, no right to claim general average contribution. On the other hand, he is not bound to expose the ship or her appliances to the risk of loss or damage by using them in a time of emergency for a purpose for which they were not intended, nor to incur an expenditure which is not only extraordinary in amount, but is incurred to procure some service which is extraordinary in its nature¹. If, therefore, any part of the ship or her tackle is applied for the common safety to some purpose different from its ordinary use, the loss arising from that application is a general average loss², for instance where a ship's engines are damaged whilst being worked ahead or astern in order to get the ship off a bank³, or spars are cut up to construct a rudder, or where, formerly, sails and cordage were used to stop a leak⁴.

1 *Robinson v Price* (1877) 2 QBD 91; on appeal (1877) 2 QBD 295, CA (use of spars as fuel). See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 610 et seq.

2 *Birkley v Presgrave* (1801) 1 East 220.

3 *The Bona* [1895] P 125, CA.

4 2 Phillips' Law of Insurance (5th Edn) s 1299. See *Harrison v Bank of Australasia* (1872) LR 7 Exch 39 at 49 per Martin B; *Robinson v Price* (1877) 2 QBD 91 (on appeal (1877) 2 QBD 295, CA).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/424. Consequential losses.

424. Consequential losses.

Losses which are the direct consequences of a general average act are general average losses¹. Thus, if holes are cut in the ship in order to take goods out for the sake of lightening her, or if water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are thereby damaged, the loss or damage in each case is general average².

¹ See PARA 420 ante.

² *Whitecross Wire Co Ltd v Savill* (1882) 8 QBD 653, CA; *The Birkhall, Papayanni and Jeronica v Grampian Steamship Co Ltd* (1896) 1 Com Cas 448. If, in order to preserve the whole adventure, the ship is taken into a port in circumstances in which she is likely to cause damage to the property of third persons and that damage in fact occurs, the compensation payable to third persons gives rise to a right to general average contribution: *Austin Friars Steamship Co Ltd v Spillers and Bakers Ltd* [1915] 3 KB 586, CA; see CARRIAGE AND CARRIERS vol 7 (2008) PARA 610 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(i) General Average Loss and General Average Contribution/425. Conditions imposed by maritime law.

425. Conditions imposed by maritime law.

The right of contribution previously referred to is expressed to be subject to the conditions imposed by maritime law¹. One of these is that, where the peril giving rise to the claim has been occasioned by the fault² of the claimant or his employee, he himself is precluded from recovering a general average contribution. Thus, to a shipowner's claim for contribution, a plea that the loss was caused by the vessel's unseaworthiness may be a valid defence³. This rule, however, bars only the claim of the wrongdoer and not that of other innocent sufferers⁴.

A further condition is that general average contribution is not recoverable in respect of the jettison of goods loaded on deck unless the loading on deck is in accordance with the usage of trade on the voyage for which the goods are shipped⁵.

1 See the Marine Insurance Act 1906 s 66(3); and PARA 420 ante.

2 Fault in this context means fault for which the claimant is legally liable. If he is protected from legal liability for the fault in question (eg by an exception in the contract of affreightment or by statute), he will not be precluded from recovering a general average contribution: *The Carron Park* (1890) 15 PD 203 (negligence of shipowners' employees excepted); applied in *Milburn & Co v Jamaica Fruit Importing and Trading Co of London* [1900] 2 QB 540, CA (master's negligence); and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 610. Owing to the effect of the 'foreign adjustment clause' in the policy (as to which see PARA 429 post), it not infrequently happens that questions of general average are determined as between assured and insurer in accordance with the York-Antwerp Rules 1974, which differ in some respects from the law of England.

3 *Schloss v Heriot* (1863) 14 CBNS 59; and see *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100 (equitable defence that shipowner could not recover for the consequence of his own wrong was not within the Carriage of Goods by Sea Act 1924 Schedule art III r 6 (repealed), which was applied by the bill of lading, and the defence was therefore not barred by lapse of time). But the plea will not be a valid defence if the shipowner is protected from liability for loss due to the unseaworthiness by the contract of affreightment or by statute (*Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, HL). See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 610.

4 *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, PC.

5 *Wright v Marwood* (1881) 7 QBD 62, CA; *Burton v English* (1883) 12 QBD 218, CA; see also CARRIAGE AND CARRIERS vol 7 (2008) PARA 611.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(ii) Liability of Insurer in respect of General Average/426. Insurer's liability in respect of expenditure, sacrifice and contribution.

(ii) Liability of Insurer in respect of General Average

426. Insurer's liability in respect of expenditure, sacrifice and contribution.

The insurer on a marine policy is liable in respect of a general average loss to the following extent.

Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls on him¹, and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute². Thus, in the cases of jettison of goods or of cutting away of a mast, the owner of the goods in the one case and the shipowner in the other can recover the full amount of the loss from the insurer³. Where, however, there is a general average expenditure, for instance that of putting into a port of refuge, the shipowner is not entitled to recover the whole amount, but only that part which he himself has to bear in respect of his own interest as shipowner⁴.

Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover for it from the insurer⁵.

In the absence of express stipulation, however, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against⁶. Thus, in a marine policy if the peril of fire is excepted, damage done by pouring water into the hold of the ship for the purpose of extinguishing a fire that breaks out in her when in dock, although a general average loss, would not be one in respect of which the insurer would be liable⁷.

1 See the Marine Insurance Act 1906 s 66(4). The York-Antwerp Rules 1974 (following English maritime law) provide that the contribution to a general average is to be made upon the actual net values of the property at the termination of the adventure (see r XVII). It follows that property which has been destroyed or become valueless before the termination of the adventure cannot be made liable to contribute in general average (*Chellew v Royal Commission on Sugar Supply* [1922] 1 KB 12, CA) and the same principle applies between assured and insurer (*Green Star Shipping Co Ltd v London Assurance* [1933] 1 KB 378). Consequently, if the amount of contribution recoverable by a shipowner from a cargo owner is reduced by reason of the loss of or damage to the cargo before the termination of the adventure, the deficiency in the cargo's contributory value represents part of the 'proportion of the loss which falls upon' the shipowner within the meaning of the Marine Insurance Act 1906 s 66(4), and is recoverable as such from the hull underwriters: *Green Star Shipping Co Ltd v London Assurance* supra. If no contribution is recoverable by the shipowner either because no interest, other than the ship, has any value at the termination of the adventure or because, in a case in which the York-Antwerp Rules 1974 do not apply, the expenditure was necessitated by the shipowner's actionable fault, the whole expenditure may be recoverable from the insurer.

2 Marine Insurance Act 1906 s 66(4); *Dickenson v Jardine* (1868) LR 3 CP 639, where the insurer, having indemnified the assured, was entitled to be subrogated to the assured's rights against the owners of other interests liable to contribute.

3 *Dickenson v Jardine* (1868) LR 3 CP 639.

4 *The Mary Thomas* [1894] P 108, CA.

5 Marine Insurance Act 1906 s 66(5). Thus, if goods are jettisoned the shipowner who has to pay a general average contribution can recover the amount from his insurer.

6 Ibid s 66(6). As to perils insured against see generally para 330 ante. The peril must really exist; it is not enough that the person incurring the loss reasonably believed that it existed: *Joseph Watson & Son Ltd v Firemen's Fund Insurance Co of San Francisco* [1922] 2 KB 355.

7 As to the amount for which underwriters are liable in respect of general average see further PARA 456 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(ii) Liability of Insurer in respect of General Average/427. Liability where ship and cargo belong to the same person.

427. Liability where ship and cargo belong to the same person.

There are certain cases in which the insurer may be liable for general average even though the different interests insured do not belong to different parties, and therefore no general average contribution is actually payable. Where ship, freight¹ and cargo, or any two of those interests, are owned by the same assured, the insurer's liability in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons². Therefore, if ship and cargo belong to the same person, and the thing sacrificed is part of the ship, the assured may sue the insurer on ship only for the ship's proportion of the loss, and the insurer on cargo is liable to indemnify him against so much of the loss as is properly attributable to cargo³.

1 For the meaning of 'freight' when used to describe the subject matter of the policy see PARA 296 ante.

2 Marine Insurance Act 1906 s 66(7), which embodies the law laid down in *Montgomery & Co v Indemnity Mutual Marine Insurance Co* [1902] 1 KB 734, CA, where the judgment in *The Brigella* [1893] P 189 was disapproved.

3 *Montgomery & Co v Indemnity Mutual Marine Insurance Co* [1902] 1 KB 734 at 741, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(iii) Place of Adjustment: Foreign Adjustment Clause/428. Place of adjustment.

(iii) Place of Adjustment: Foreign Adjustment Clause

428. Place of adjustment.

The proper place for the adjustment of general average is the ship's port of destination or discharge¹. If the adventure is broken up at an intermediate port, either by necessity or by the parties' consent, that port is the proper place for adjusting the general average², and if the port in which the adjustment is made is a foreign port, the adjustment is called a 'foreign adjustment'³. The shipper of goods, inasmuch as he must be taken to assent to general average as a known maritime usage, is, by assenting to it, also deemed to have agreed to its adjustment at the usual and proper place; that adjustment is conclusive on the parties to the contract of affreightment both as to the items and as to their apportionment on the various interests, although it may be different from that which the law of the United Kingdom would have made if the adjustment had been settled in home ports⁴. There is, however, one exception to this general rule, namely where the loss declared by the adjustment to be general average does not arise from any of the perils covered by the policy⁵.

1 *Simonds v White* (1824) 2 B & C 805.

2 As to what justifies the termination of the voyage at an intermediate port see *Mavro v Ocean Marine Insurance Co* (1875) LR 10 CP 414, Ex Ch; *Hill v Wilson* (1879) 4 CPD 329 (damage to ship and cargo); *Fletcher v Alexander* (1868) LR 3 CP 375 at 382; and see *Shipton v Thornton* (1838) 9 Ad & El 314; *Atwood v Sellar & Co* (1880) 5 QBD 286, CA.

3 See *Simonds v White* (1824) 2 B & C 805. As to the foreign adjustment clause in policies see PARA 429 post.

4 *Harris v Scaramanga* (1872) LR 7 CP 481; *Simonds v White* (1824) 2 B & C 805 at 813; *Dalglish v Davidson* (1824) 5 Dow & Ry KB 6; *Mavro v Ocean Marine Insurance Co* (1875) LR 10 CP 414, Ex Ch; *The Mary Thomas* [1894] P 108, CA.

5 *Harris v Scaramanga* (1872) LR 7 CP 481 at 489, 496; *Newman v Cazalet* (circa 1780) 2 Park's Marine Insurances (8th Edn) 900; *Walpole v Ewer* (1789) 2 Park's Marine Insurances (8th Edn) 898; *Power v Whitmore* (1815) 4 M & S 141. The Marine Insurance Act 1906 s 66(6) (see PARA 426 ante) seems to be intended to embody the law laid down in the judgments in *Harris v Scaramanga* supra, to the effect that if a general average loss has been caused by a peril expressly excepted by the policy, the insurers would not be liable in respect of it, whatever might be the tenor of the foreign adjustment.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(iii) Place of Adjustment: Foreign Adjustment Clause/429. Foreign adjustment clause.

429. Foreign adjustment clause.

It has become the regular practice to insert in policies a special clause known as the 'foreign adjustment clause', by which provision is made for the contingency of an adjustment being made abroad.

The clause in relation to cargo broadly provides for the insurance to cover general average and salvage charges, adjusted or determined according to the contract and/or the governing law and practice¹.

The clause in relation to hulls or freight broadly provides for adjustment to be either under the law and practice of the place where the adventure ends, as if the contract contains no relevant special terms, or where the contract so provides, under the York-Antwerp Rules 1974².

1 See the Institute Cargo Clauses (A) cl 2; the Institute Cargo Clauses (B) cl 2; the Institute Cargo Clauses (C) cl 2; the Institute War Clauses (Cargo) cl 2; and the Institute Strikes Clauses (Cargo) cl 2. The effect of this clause is to make the insurer liable in accordance with adjustment made under the contract, or in accordance with an adjustment made under the law and practice governing the contract. As to the Institute Clauses generally see PARA 330 ante.

2 See the Institute Time Clauses (Hulls) cl 10.2; the Institute Voyage Clauses (Hulls) cl 8.2; the Institute War and Strikes Clauses (Hulls--Time) cl 2; the Institute War and Strikes Clauses (Hulls--Voyage) cl 2; the Institute Time Clauses (Freight) cl 11.2; the Institute Voyage Clauses (Freight) cl 8.2; the Institute War and Strikes Clauses (Freight--Time) cl 2; and the Institute War and Strikes Clauses (Freight--Voyage) cl 2. This clause has the effect of making the insurer liable either in accordance with the foreign adjustment or in accordance with an adjustment under the York-Antwerp Rules 1974. The form of clause was framed on account of the decision in *De Hart v CA de Seguros Aurora* [1903] 2 KB 503, CA. As to the position where the contract contains no special terms as to foreign adjustment (or, under the standard clause, is deemed to contain no such terms), see *Harris v Scaramanga* (1872) LR 7 CP 481 at 495.

The Institute Time Clauses (Hulls) cl 10.3 and the Institute Voyage Clauses (Hulls) cl 8.3 (also as incorporated respectively by the Institute War and Strikes Clauses (Hulls--Time) cl 2 and the Institute War and Strikes Clauses (Hulls--Voyage) cl 2), also make special provision for the application of the York-Antwerp Rules 1974 (omitting rr XI(d), XX and XXI) to ballast voyages not under charter.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(10) GENERAL AVERAGE/(iii) Place of Adjustment: Foreign Adjustment Clause/430. On whom foreign adjustment is binding.

430. On whom foreign adjustment is binding.

The foreign adjustment, when made in accordance with the law of the foreign port, binds the assured as well as the insurer, and the assured cannot recover from the insurer, as particular average or otherwise, what the foreign statement has declared to be recoverable as general average by a contribution of the other interests. The assured is not at liberty to approbate and reprobate; he cannot take the benefit of the foreign law and claim general average in accordance with the foreign adjustment, and at the same time repudiate the foreign statement for the purpose of claiming particular average against his insurer. He is bound for all purposes by the foreign statement as to what expenses were incurred on behalf of ship and cargo¹.

¹ *The Mary Thomas* [1894] P 108, CA; contrast *Green Star Shipping Co Ltd v London Assurance* [1933] 1 KB 378, where the clause was substantially in the form indicated in PARA 429 text to note 2 ante; it was held that the decision in *The Mary Thomas* supra was inapplicable since there was no express stipulation that payment was to be made according to the foreign adjustment. See, however, Arnould on Marine Insurance (16th Edn) s 1000, where it is suggested that the principle adopted in *De Hart v CA de Seguros Aurora* [1903] 2 KB 503, CA, that parties in effect agree to be bound by the foreign adjustment clause, should apply in the absence of reference to the York-Antwerp Rules.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(i) Insurable Value/431. Insurable value.

(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE

(i) Insurable Value

431. Insurable value.

The insurable value of the subject matter insured¹ is relevant in determining the measure of indemnity in the case of an unvalued policy², and in the case of a valued policy³ when the valuation is not conclusive⁴ or has to be apportioned⁵.

In policies on ship or goods it is generally assumed that the object of the insurance is to put the assured, in the event of loss, in the same position as he would have occupied if he had never embarked on the insured adventure; but this assumption cannot, from the nature of the case, apply to policies on profits, commissions, freight etc, nor to valued policies on ship or goods⁶.

1 As to the subject matter insured see generally para 217 ante. As to the measurement of insurable value see PARA 432 post.

2 See the Marine Insurance Act 1906 ss 28, 68(2); and PARA 441 post. For the meaning of 'unvalued policy' see PARA 222 ante.

3 For the meaning of 'valued policy' see PARA 222 ante.

4 See the Marine Insurance Act 1906 ss 27, 29(4); and PARAS 222-223, 290 ante.

5 See *ibid* ss 71(1), 72; and PARA 446 post.

6 For observations on the amount recoverable under a policy on hull and machinery covering a prolongation of voyage under orders or directions of the government see *Union-Castle Mail Steamship Co Ltd v United Kingdom Mutual War Risks Association Ltd* [1958] 1 QB 380 at 402, [1958] 1 All ER 431 at 440 per Diplock J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(i) Insurable Value/432. Rules for measuring insurable value.

432. Rules for measuring insurable value.

Subject to any express provision or valuation in the policy, the insurable value¹ of a ship is the value at the commencement of the risk² of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole, and in the case of a steamship the insurable value includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade³.

Subject also to any express provision or valuation in the policy:

- 115 (1) the insurable value of freight⁴, whether paid in advance or otherwise, is the gross amount of the freight at the assured's risk, plus the charges of insurance⁵;
- 116 (2) the insurable value of goods or merchandise is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole⁶; and
- 117 (3) the insurable value of any other subject matter is the amount at the assured's risk when the policy attaches, plus the charges of insurance⁷.

In all the rules for determining insurable value the charges of insurance are mentioned, and it is expressly provided that the assured has an insurable interest in the charges of any insurance he may effect⁸.

1 The insurable value should be distinguished from the contributory value for the purposes of general average (see PARAS 426 note 1 ante, 456 post) and salvage (see PARA 456 post).

2 'At the commencement of the risk' probably means at the commencement of the risk at each stage of the voyage.

3 Marine Insurance Act 1906 s 16(1). Cf the definition of 'ship' in Sch 1 r 15 (see PARA 294 ante). As to what was deemed to be covered by the word 'ship' before the Act see *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 2 QB 380 at 383, CA. As to outfit and ordinary fittings see also PARA 294 note 1 ante.

4 For the meaning of 'freight' when used to describe the subject matter of the policy see PARA 296 ante.

5 Marine Insurance Act 1906 s 16(2). This was the law before the Act: *Forbes v Aspinall* (1811) 13 East 323 at 326; *Palmer v Blackburn* (1822) 1 Bing 61. In *United States Shipping Co v Empress Assurance Corp'n* [1907] 1 KB 259 (affd on appeal [1908] 1 KB 115, CA), Channell J held that a charterer who sublet the ship was entitled to recover the whole freight without deduction of the chartered freight which he would have had to pay to the shipowner.

6 Marine Insurance Act 1906 s 16(3); see *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442. 'Prime cost' means the prime cost to the assured at or about the time of shipment, or at any rate at some time when the prime cost can be reasonably deemed to represent the value of the goods to their owner at the date of shipment: *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 at 102, CA, per Greer LJ. As regards the invoice price of goods shipped from a foreign port and expressed in the currency of a foreign country see Arnould on Marine Insurance (16th Edn) s 449.

7 Marine Insurance Act 1906 s 16(4).

8 Ibid s 13. The mode in which these charges are insured is as follows: if the insurance premium, together with the insurance charges, amounts to R per cent, and if the possible loss amounts to a sum S, then the total amount required to be insured would be:

$$\frac{S \times 100}{100 - R}$$

(see Arnould on Marine Insurance (16th Edn) ss 445, 446).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(ii) Particular Average: Particular Charges: Salvage Charges/433. Particular average.

(ii) Particular Average: Particular Charges: Salvage Charges

433. Particular average.

A particular average loss is a partial loss of the subject matter insured¹, caused by a peril insured against², and which is not a general average loss³. Thus, if part of the goods is lost or if the ship is damaged by a peril insured against, that loss or damage, where not caused by a general average act so as to constitute a general average loss, is a particular average loss⁴. Expenses incurred by or on behalf of the assured for the safety or preservation of the subject matter insured, other than general average or salvage charges, are called 'particular charges', and are not included in particular average⁵.

1 As to the subject matter insured see generally para 217 ante.

2 As to perils insured against see PARA 330 ante.

3 Marine Insurance Act 1906 s 64(1). As to general average losses see PARA 420 et seq ante.

4 In *Kidston v Empire Insurance Co* (1866) LR 1 CP 535 (on appeal (1867) LR 2 CP 357) it was found by a special jury that, in the business of marine insurance, particular average denotes actual damage done to or loss of part of the subject matter of the insurance, but that it does not include any expenses incurred in recovering or preserving the property insured, which were termed particular charges. Loss of a ship's earnings during detention is not a particular average loss under a policy on ship: *Polurrian Steamship Co Ltd v Young* (1913) 19 Com Cas 143; affd without dealing with this point [1915] 1 KB 922, CA.

5 Marine Insurance Act 1906 s 64(2). As to salvage charges and particular charges see PARA 434 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(ii) Particular Average: Particular Charges: Salvage Charges/434. General average, salvage and particular charges distinguished.

434. General average, salvage and particular charges distinguished.

The distinction between general average, salvage and particular charges should be carefully noted. General average charges have already been dealt with¹. 'Salvage charges' means the charges which are recoverable under maritime law by a salvor independently of contract². The right to these is wholly dependent upon the success of the salvage operations³. Salvage charges do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purposes of averting a peril insured against; such expenses, where properly incurred, may be recovered as particular charges, or as a general average loss, according to the circumstances under which they were incurred⁴. Thus expenses incurred for the preservation or safety either of ship or cargo, or freight, and not of the whole property at risk, are particular charges, and are neither general average, nor particular average, nor salvage charges.

Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils⁵, and are not recoverable under the suing and labouring clause⁶. Particular charges are, however, recoverable under that clause⁷.

1 See PARA 420 et seq ante.

2 Marine Insurance Act 1906 s 65(2).

3 As to salvage see generally SHIPPING AND MARITIME LAW vol 94 (2008) PARA 876 et seq.

4 Marine Insurance Act 1906 s 65(2); *Aitchison v Lohre* (1879) 4 App Cas 755, HL. The distinction between maritime salvage which is independent of contract, and salvage services rendered under a contract, must often be one of great nicety, inasmuch as no one has a right to render salvage services to a ship against the master's will.

5 Marine Insurance Act 1906 s 65(1); *Aitchison v Lohre* (1879) 4 App Cas 755, HL; *The Bosworth* [1962] 1 Lloyd's Rep 483 at 490. As to the conditions under which salvage remuneration is claimable, and as to the amount recoverable for it, see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 903 et seq.

6 Marine Insurance Act 1906 s 78(2); see PARA 436 post.

7 See PARA 436 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(iii) Suing and Labouring Clause/435. Suing and labouring clause.

(iii) Suing and Labouring Clause

435. Suing and labouring clause.

Where the policy contains a suing and labouring clause¹, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred² pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject matter may have been warranted free from particular average, either wholly or under a certain percentage³.

The object of the suing and labouring clause is to encourage the assured, in case of accident, to take all necessary steps for the preservation of the property insured. For this purpose the insurers agree that any such action is to be without prejudice to the insurance or to the notice of abandonment in the case of a constructive total loss, and also to contribute to any expenditure incurred for the purpose of averting impending loss. It is because the clause is supplementary to and distinct from the contract contained in the policy that the assured can recover in respect of a total loss, not only the whole amount insured, but also in addition the expenses incurred under the clause⁴.

1 For the suing and labouring clause in the former Lloyd's Marine Policy see the Marine Insurance Act 1906 Sch 1. The clause was followed by a waiver clause.

The suing and labouring clause is now referred to in the Institute Clauses as the 'duty of assured' clause. In relation to cargo, the waiver clause immediately follows it; in relation to hulls, the waiver clause is incorporated in the duty of assured clause. See the Institute Cargo Clauses (A) cl 16, 17; the Institute Cargo Clauses (B) cl 16, 17; the Institute Cargo Clauses (C) cl 16, 17; the Institute War Clauses (Cargo) cl 11, 12; the Institute Strikes Clauses (Cargo) cl 11, 12; the Institute Time Clauses (Hulls) cl 11; the Institute Voyage Clauses (Hulls) cl 9; the Institute War and Strikes Clauses (Hulls--Time) cl 2; the Institute War and Strikes Clauses (Hulls--Voyage) cl 2.

As to the forms of marine policy and the Institute Clauses generally see PARAS 225, 330 ante.

2 Whether the expenses have been properly incurred is a matter of fact: see eg *The Pomeranian* [1895] P 349; *Wilson Bros Bobbin Co Ltd v Green* [1917] 1 KB 860; *St Margaret's Trust Ltd v Navigators and General Insurance Co Ltd* (1949) 82 Ll L Rep 752; *Integrated Container Service Inc v British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154, CA.

3 Marine Insurance Act 1906 s 78(1). The decision in *Emperor Goldmining Co Ltd v Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep 348, NSW SC, to the effect that, where there is no suing and labouring clause in the policy, particular charges incurred by the assured in preserving the subject matter insured are recoverable, would appear not to be in accordance with principle for, if it is correct, no suing and labouring clause need ever be inserted in a policy.

4 See the Marine Insurance Act 1906 s 78(1); *Lohre v Aitchison* (1878) 3 QBD 558 at 567, CA, per Brett LJ, and in the judgment in the same case in the House of Lords sub nom *Aitchison v Lohre* (1879) 4 App Cas 755 at 763, HL, per Lord Blackburn. The suing and labouring clause does not cover the costs incurred by the assured in successfully defending an action brought against him to recover a loss in respect of which the underwriters would have been liable under the 'running down clause' (now the Institute collision clauses; see PARAS 345-347 ante): *Xenos v Fox* (1869) LR 4 CP 665, Ex Ch. Nor does the suing and labouring clause apply to an insurance effected by a carrier of goods, not on the cargo itself, but in order to protect himself from liabilities which he might incur as carrier: *Cunard Steamship Co v Marten* [1903] 2 KB 511, CA.

UPDATE

435 Suing and labouring clause

NOTE 4--As a claim for suing and labouing expenses is distinct from a claim for constructive total loss, it must be pleaded accordingly in that the pleading should specify the measures taken to avert or minimise the insured loss, the grounds on which it is claimed such measures are reasonable, and the cost of each of the measures: *North Star Shipping Ltd v Sphere Drake Insurance plc* [2004] EWHC 2457 (Comm), [2004] 1 All ER (Comm) 112.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(iii) Suing and Labouring Clause/436. Charges covered by the suing and labouring clause.

436. Charges covered by the suing and labouring clause.

The suing and labouring clause covers particular charges¹ and not a general average loss², because by its very terms it is confined to expenses incurred for the safety and preservation of the particular property insured, and does not comprise expenses incurred for the purpose of averting or diminishing any loss not covered by the policy³. It does not cover maritime salvage charges, because maritime salvage services, as distinguished from services in the nature of salvage rendered under an agreement, are not rendered by the assured, his factors, employees and assigns⁴. Maritime salvage charges, therefore, are recoverable only under the head of a loss by a peril insured against, and cannot be recovered in addition to the sum insured⁵.

1 As to particular charges see PARAS 433-434 ante.

2 As to general average loss see PARA 420 et seq ante.

3 See the Marine Insurance Act 1906 s 78(2), (3). See eg *Weissberg v Lamb* (1950) 84 Ll L Rep 509; *F W Berk & Co Ltd v Style* [1956] 1 QB 180, [1955] 3 All ER 625.

4 This form of words is taken from the original suing and labouring clause: see the Form of Policy in the Marine Insurance Act 1906 Sch 1.

5 See *ibid* s 78(2). See the judgment of Lord Blackburn in *Aitchison v Lohre* (1879) 4 App Cas 755; see also *Dixon v Whitworth*, *Dixon v Sea Insurance Co* (1879) 4 CPD 371, CA. As to salvage charges see PARA 434 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(iii) Suing and Labouring Clause/437. Assured's duty to minimise loss.

437. Assured's duty to minimise loss.

The provision in the original suing and labouring clause was of a permissive character¹, but it is and has long been the duty of the assured and his agents², in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss³. Whether the assured has taken reasonable measures is a question of fact⁴.

¹ See PARA 435 text and note 1 ante.

² 'His agents' should be read as inapplicable to the master or crew unless expressly instructed by the assured in relation to what to do or not to do in respect of suing and labouring; many persons other than the master or members of the crew may be agents of the assured with the duty to act on his behalf in relation to suing and labouring. A possible exception exists in the case of a master/owner: negligent navigation by such an assured will not bar his claim under the Marine Insurance Act 1906 s 55(2)(a) (as to which see PARA 348 ante), but s 78(4) seems to impose the statutory duty on him: *Astrovlanis Companie Naviera SA v Linard, The Gold Sky* [1972] 2 Lloyd's Rep 187 at 221 per Mocatta J. See also note 3 infra.

³ Marine Insurance Act 1906 s 78(4). This provision is couched in substantially the same terms as the Institute Clauses relating to the duty of the assured (as to which see PARA 435 note 1 ante). There is an apparent anomaly between the Marine Insurance Act 1906 s 78(4) and s 55(2)(a) (as to which see PARA 348 ante) which was unresolved in a number of cases (see eg *Gaunt v British and Foreign Insurance Co Ltd* [1920] 1 KB 903, CA (on appeal sub nom *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, HL); *Lind v Mitchell* (1928) 98 LJB 120, CA). The position now is 'that the principle embodied in the Marine Insurance Act 1906 s 55(2)(a) applies before and after a casualty and that the duty referred to in s 78(4) will only have significance in the rare case where breach of that duty is so significant as to be held to displace the prior insured peril as the proximate cause of the loss. Even in that rare case, however, the breach of s 78(4) is unlikely in practice to afford a defence to underwriters. This is because such breach is likely to constitute a separate insured peril under the express cover that has, for many years, been given by the standard forms of policies of marine insurance against negligence of the master, officers and crew': *Netherlands (Represented by the Minister of Defence) v Youell and Hayward* [1998] 1 Lloyd's Rep 236 at 245, [1998] CLC 44 at 54, CA, per Phillips LJ; see also *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 All ER (Comm) 213, [2002] 2 Lloyd's Rep 88.

The clause does not apply where the expenses were caused by the condition of the goods at the time of shipment: *F W Berk & Co Ltd v Style* [1956] 1 QB 180, [1955] 3 All ER 625. It seems clear that the insurer cannot recover, where there is a suing and labouring clause, expenses which he has incurred in saving or protecting the property: *Crouan v Stanier* [1904] 1 KB 87. Insurers on freight are not liable under the suing and labouring clause for any part of the cost of salving a vessel where there is no prospect of preserving the insured freight by salving the vessel: *Carras v London and Scottish Insurance Corp Ltd* (1935) 52 Ll L Rep 34; revsd on other grounds [1936] 1 KB 291, CA. Special provisions of the policy may negative the effect of a suing and labouring clause: *Berns and Koppstein Inc v Orion Insurance Co Ltd and Stone* [1960] 1 Lloyd's Rep 276, Dist Ct NY.

⁴ See eg *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089; *Astrovlanis Companie Naviera SA v Linard, The Gold Sky* [1972] 2 Lloyd's Rep 187; *Netherlands Insurance Co Est 1845 Ltd v Karl Ljunberg & Co AB* [1986] 3 All ER 767, [1986] 2 Lloyd's Rep 19, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(iii) Suing and Labouring Clause/438. When the suing and labouring clause applies.

438. When the suing and labouring clause applies.

The occasion upon which the suing and labouring clause comes into force is the happening of any loss or misfortune covered by the policy; if it is not covered by the policy, the clause has no operation. For instance, if a ship insured free of capture is in danger of being taken by an enemy, and the assured or his employees take steps to prevent the capture, this will not fall within the terms of the clause, and no charges incurred for this purpose will be recoverable. Similarly, if the policy is one against total loss only, and there is danger, not of a total loss, but only of a partial loss, the expenses incurred to prevent that partial loss are not recoverable under the clause¹. If, however, goods are insured free of average, or free of average under a certain percentage, and there is a danger of a total loss or a loss exceeding the percentage which is averted by the action of the assured or his employees so that the resulting loss is not covered by the policy, the expenses so incurred to avert the loss may be recovered under the suing and labouring clause, even though the actual loss cannot be claimed².

¹ *Great Indian Peninsula Ry Co v Saunders* (1862) 2 B & S 266, Ex Ch; *Booth v Gair* (1863) 15 CBNS 291. In the latter case the court proceeded, whether rightly or wrongly, on the ground that there was no risk of a total loss to the goods. Contrast *Wilson Bros Bobbin Co Ltd v Green* [1917] 1 KB 860.

² See the Marine Insurance Act 1906 s 78(1); and PARA 435 ante. See also *Kidston v Empire Marine Insurance Co* (1866) LR 1 CP 535 at 542-544 per Willes J (affd (1867) LR 2 CP 357, Ex Ch); approved *Meyer v Ralli* (1876) 1 CPD 358.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(iv) Particular Average Warranties/439. Particular average warranties.

(iv) Particular Average Warranties

439. Particular average warranties.

Where the subject matter insured is warranted free from particular average¹, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice², unless the contract contained in the policy is apportionable; but, if the contract is apportionable, the assured may recover for a total loss of any apportionable part³.

Where the subject matter is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges and for particular charges⁴ and other expenses properly incurred pursuant to the provisions of the suing and labouring clause⁵ in order to avert a loss insured against⁶.

Unless the policy otherwise provides, where the subject matter insured is warranted free from particular average under a specified percentage, a general average loss may not be added to a particular average loss to make up the specified percentage⁷. For the purpose of ascertaining whether the specified percentage has been reached, regard must be had only to the actual loss suffered by the subject matter insured; particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded⁸.

1 As to particular average see PARAS 433-434 ante. The former Lloyd's Marine Policy contained a memorandum (known as the common memorandum) to be added where the subject matter insured was one of certain types of perishable goods: see the Marine Insurance Act 1906 Sch 1. The modern Institute Clauses do not contain this provision, so the Marine Insurance Act 1906 s 76, the provisions of which are described below, is now of little relevance.

2 As to general average sacrifice see PARA 420 et seq ante.

3 Marine Insurance Act 1906 s 76(1).

4 As to salvage charges and particular charges see PARA 434 ante.

5 As to the suing and labouring clause see PARAS 433, 435-438 ante.

6 Marine Insurance Act 1906 s 76(2).

7 Ibid s 76(3).

8 Ibid s 76(4); *Rohl v Parr* (1796) 1 Esp 445.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/440. Effect of under-insurance.

(v) Measure of Indemnity

440. Effect of under-insurance.

Where the assured¹ is insured for an amount less than the insurable value, or in the case of a valued policy² for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance³. He then bears such part of the loss as is proportional to the uninsured balance, and in case of a total loss is entitled to the same proportion of the salvage⁴. For this reason it is convenient to consider him as his own insurer, liable to pay to himself a sum proportional to the uninsured balance, for by so doing it may be laid down as a general proposition that each insurer is liable for the loss in proportion to the amount underwritten by himself.

1 As to the assured see PARA 216 note 1 ante.

2 For the meaning of 'valued policy' see PARA 222 ante.

3 Marine Insurance Act 1906 s 81. Where 'captain's effects' were insured under an unvalued policy against total loss of vessel only, and part of the effects were on shore at the time of the loss, it was held that this part must be included in arriving at the insurable value of the goods: *Anstey v Ocean Marine Insurance Co Ltd* (1913) 83 LJB 218.

4 *The Welsh Girl* (1906) 22 TLR 475; affd sub nom *The Commonwealth* [1907] P 216, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/441. Measure of indemnity.

441. Measure of indemnity.

The sum which the assured¹ can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy² to the full extent of the insurable value³, or, in the case of a valued policy⁴ to the full extent of the value fixed by the policy, is called the measure of indemnity⁵. Where there is a loss recoverable under the policy, the insurer, or each insurer if there is more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy⁶.

Nothing in the provisions of the Marine Insurance Act 1906 relating to the measure of indemnity⁷ affects the rules relating to double insurance⁸, or prohibits the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject matter insured was not at risk under the policy⁹.

1 As to the assured see PARA 216 note 1 ante.

2 For the meaning of 'unvalued policy' see PARA 222 ante.

3 As to the insurable value see PARAS 431-432 ante.

4 For the meaning of 'valued policy' see PARA 222 ante.

5 Marine Insurance Act 1906 s 67(1). Sections 67 and 68 (see PARA 442 post) are definitive of an insurer's liability, and an assured is not entitled to any additional special or general damages: *Ventouris v Mountain, The Italia Express (No 2)* [1992] 2 Lloyd's Rep 281 at 291 per Hirst J.

6 Marine Insurance Act 1906 s 67(2). This may be illustrated as follows: if M is the measure of indemnity, ie the amount of any loss recoverable under a policy in which the assured is fully insured, S the amount subscribed by any one underwriter, and V the value fixed by the policy in the case of a valued policy, or the

insurable value in the case of an unvalued policy, then the underwriter is liable for: $\frac{S}{V} \times M$.

7 Ie in ibid ss 67-74: see PARAS 442-456 post.

8 As to the rules relating to double insurance see ibid s 32; and PARAS 495-497 post.

9 Ibid s 75(2).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/442. Total loss.

442. Total loss.

In general, where there is a total loss of the subject matter insured, in the case of a valued policy¹ the measure of indemnity² is the sum fixed by the policy, and in the case of an unvalued policy³ the measure of indemnity is the insurable value⁴ of the subject matter insured⁵.

1 For the meaning of 'valued policy' see PARA 222 ante.

2 As to the measure of indemnity see PARA 441 ante.

3 For the meaning of 'unvalued policy' see PARA 222 ante.

4 As to the insurable value see PARAS 431-432 ante.

5 Marine Insurance Act 1906 s 68, which is expressed to be subject to the provisions of that Act and to any express provision in the policy. In *Woodside v Globe Marine Insurance Co* [1896] 1 QB 105, the rule was applied, even though, when the peril insured against occurred, the ship was already a constructive total loss. See also *Lidgett v Secretan* (1871) LR 6 CP 616; *Barker v Janson* (1868) LR 3 CP 303; *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 (where the indemnity recovered in the case of an unvalued policy was reduced by the amount recovered under the Carriage of Goods by Sea Act 1924 s 1, Schedule art IV para 5 (repealed: see now the Hague Rules, scheduled to the Carriage of Goods by Sea Act 1971; see further CARRIAGE AND CARRIERS), from the owners of the vessel carrying the insured cargo). The Marine Insurance Act 1906 ss 67, 68 (see PARA 441 ante) are definitive of an insurer's liability, and an assured is not entitled to any additional special or general damages; consequently, where there is a total loss of a vessel, the assured is not entitled to claim damages for loss of income, the increase in capital value of a replacement vessel, hardship, inconvenience and mental distress: *Ventouris v Mountain, The Italia Express (No 2)* [1992] 2 Lloyd's Rep 281 at 291 per Hirst J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/443. Total loss of part of cargo.

443. Total loss of part of cargo.

Where part of the goods, merchandise or other movables insured by a valued policy¹ is totally lost, then, subject to any express provision of the policy, the measure of indemnity² is such proportion of the sum fixed by the policy as the insurable value³ of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy⁴. Where, however, several different articles are insured together in the same policy and each sustains damage, the loss must be adjusted separately on each, even though the clause 'to pay average on each species if separately insured' is not inserted in the policy⁵.

Where there is a total loss of part of the goods insured under an unvalued policy, the measure of indemnity, subject to any express provision of the policy, is the insurable value of the part lost, ascertained as in the case of total loss⁶.

Where out of a number of packages of goods insured only a few articles or pieces in each package arrive damaged, the sound and damaged goods are likely to be sold together at the same auction; but in that case the diminished value at which the sound part of the package may be sold, owing to the assortment being broken, is not a loss for which the underwriter is liable⁷, nor is he liable for the cost of examining such goods as prove to be undamaged⁸.

1 For the meaning of 'valued policy' see PARA 222 ante.

2 As to the measure of indemnity see PARA 441 ante.

3 As to the insurable value of goods see PARAS 431-432 ante.

4 Marine Insurance Act 1906 s 71(1); *Lewis v Rucker* (1761) 2 Burr 1167. For the meaning of 'unvalued policy' see PARA 222 ante.

5 Benecke's Principles of Indemnity in Marine Insurance 441.

6 Marine Insurance Act 1906 s 71(2).

7 *Cator v Great West Insurance Co of New York* (1873) LR 8 CP 552; *J Lysaght Ltd v Coleman* [1895] 1 QB 49, CA; *Brown Bros v Fleming* (1902) 7 Com Cas 245. As to the charges, such as brokerage and commission, incurred in the sale by auction of the damaged goods see Stevens's Essay on Average in Marine Insurance 148-150; Benecke's Principles of Indemnity in Marine Insurance 436.

8 *J Lysaght Ltd v Coleman* [1895] 1 QB 49, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/444. Damage to part of cargo.

444. Damage to part of cargo.

If the insured goods or some of them arrive damaged, then, as they can seldom be repaired and are always intended to be sold (differing in this respect from the ship)¹, the first thing to be ascertained is the extent of the depreciation caused by the damage. This is done by comparing the price for which the goods would have been sold, had they arrived sound, with the price for which they actually are sold in their damaged condition. Where the goods are sold by public auction, the gross amount they realise is called the 'damaged value', and the value they would have sold for if sound, that is to say the current price for sound articles of the same kind in the same market, is called the 'sound value'. The difference between the damaged and the sound values, calculated in the manner described, determines the depreciation of the goods caused by the damage, and is entirely independent of the rise or fall of the market value of the goods². The gross value is generally the wholesale price or, if there is no such price, the estimated value, calculated (in either case) on the assumption that freight, landing charges and duty have been paid beforehand; but where the goods or merchandise are such as are customarily sold in bond, the bonded price is deemed to be the gross value³.

The extent of depreciation, measured by the proportion which the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value, may be conveniently called the percentage of loss⁴. It is this percentage of loss of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, which is, subject to any express provision in the policy, the measure of indemnity, or, in other words, the total amount for which all the insurers, including the assured himself if he is not fully insured⁵, are liable⁶.

1 See *Lohre v Aitchison* (1877) 2 QBD 501 at 507 per Lush J; on appeal sub nom *Aitchison v Lohre* (1879) 4 App Cas 755 at 762, HL, per Lord Blackburn.

2 See the Marine Insurance Act 1906 s 71(3); *Lewis v Rucker* (1761) 2 Burr 1167; *Johnson v Sheddon* (1802) 2 East 581. Where damaged goods prior to sale are necessarily reconditioned, it is the value of the reconditioned goods, and not that of the goods less the cost of reconditioning, that is to be compared with the sound value in order to ascertain the proportion of loss, for the cost of reconditioning is recoverable under the suing and labouring clause: *Francis v Boulton* (1895) 65 LJQB 153. As to the suing and labouring clause see PARA 435 ante.

3 See the Marine Insurance Act 1906 s 71(4). 'Gross proceeds' means the actual price obtained at a sale where all charges on sale are paid by the sellers: s 71(4).

4 See *ibid* s 71(3).

5 As to under-insurance see PARA 440 ante.

6 See the Marine Insurance Act 1906 s 71(3); and PARA 441 ante. It may be readily shown that, whether the policy is a valued or an unvalued one, the insurer is liable to pay in respect of goods arriving in a damaged condition the same percentage of the amount actually subscribed by him. Thus, if the agreed value is V, the amount subscribed by the underwriter S, and the percentage of loss R, then the measure of indemnity is:

$$\frac{R}{100} \times V$$

and the underwriter is liable for:

$$\frac{R}{100} V \times \frac{S}{V} \text{ or } \frac{R}{100} \times S$$

Cf *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089, cited in PARA 447 note 8 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/445. Goods sold at a port of distress.

445. Goods sold at a port of distress.

It sometimes happens that goods are sold at a port of distress because they are found to be so damaged as not to be fit for reloading. In that case the claim is adjusted as a salvage loss, that is to say, the insurers pay the difference between the insurable or agreed value of the goods and the net proceeds of the sale¹.

¹ Stevens's Essay on Average in Marine Insurance 81; Benecke's Principles of Indemnity in Marine Insurance 444.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/446. Apportionment of valuation.

446. Apportionment of valuation.

Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values¹, as in the case of an unvalued policy². The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by the Marine Insurance Act 1906³.

Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities or descriptions of goods⁴.

1 As to insurable value see PARAS 431-432 ante.

2 Marine Insurance Act 1906 s 72(1). For the meaning of 'unvalued policy' see PARA 222 ante.

3 Ibid s 72(1).

4 Ibid s 72(2). For the meaning of 'sound value' see PARA 444 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/447. Partial loss of ship.

447. Partial loss of ship.

Where a ship¹ is damaged, but is not totally lost, the measure of indemnity², subject to any express provision in the policy, is as follows:

- 118 (1) where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs³, less the customary deductions⁴, but not exceeding the sum insured in respect of any one casualty⁵;
- 119 (2) where the ship has been only partially repaired, the assured is entitled to the reasonable cost of the repairs, computed as above, and also to be indemnified for the reasonable depreciation⁶, if any, arising from the unrepaired damage, provided that the aggregate amount does not exceed the cost of repairing the whole damage, computed as above⁷;
- 120 (3) where the ship has not been repaired, and has not been sold in her damaged state during the risk⁸, the assured is entitled to be indemnified for the reasonable depreciation⁹ arising from the unrepaired damage, but not exceeding the reasonable cost of repairing that damage¹⁰, computed as above¹¹.

1 In the Marine Insurance Act 1906 'ship' includes hovercraft: see PARA 294 ante.

2 As to the measure of indemnity see PARA 441 ante.

3 As to the nature of the repairs which the assured is entitled to require see PARA 452 post. Reasonable fees for classification surveyors and other surveyors are allowable as the cost of repairs (*Agenoria Steamship Co Ltd v Merchants Marine Insurance Co Ltd* (1903) 8 Com Cas 212; *The Medina Princess* [1965] 1 Lloyd's Rep 361 at 523) but not crew's wages (*Robertson v Ewer* (1786) 1 Term Rep 127; *De Vaux v Salvador* (1836) 4 Ad & El 420; *The Medina Princess* supra at 523).

4 As to the customary deductions see PARA 449 post.

5 Marine Insurance Act 1906 s 69(1).

6 The time for calculation of the depreciation is the time when cover ceases: *Kusel v Atkin, The Catariba* [1997] 2 Lloyd's Rep 749.

7 Marine Insurance Act 1906 s 69(2).

8 In the case of a voyage policy (see PARA 222 ante) the risk terminates when the insured vessel is abandoned by the assured in circumstances and in language which make it clear that he does not intend to pursue the voyage to its destination: *Irvin v Hine* [1950] 1 KB 555 at 571, [1949] 2 All ER 1089 at 1092. In the case of a time policy (see PARA 222 ante) the risk terminates when the policy expires: *The Medina Princess* [1965] 1 Lloyd's Rep 361 at 516. As to the position where the ship is sold unrepaired see PARA 448 post.

9 The correct method of calculating depreciation for the purposes of this rule has not yet been decided. Possible tests are:

3 (1) the difference between the conventional value and the true damaged value, and

4 (2) the figure resulting from the application to the conventional value of the proportion of actual depreciation.

See *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089, in which the point was left open. The second method is similar to that prescribed for the case of damaged goods (see the Marine Insurance Act 1906 s 71(3); and PARA 444 ante) and was applied in *The Armar* [1954] 2 Lloyd's Rep 95, NY SC. Cf *Elcock v Thomson* [1949] 2 KB 755, [1949] 2 All ER 381 (fire insurance). See further Arnould on Marine Insurance (16th Edn) s 1116.

The time for calculation of the depreciation under both the Marine Insurance Act 1906 s 69(2) and s 69(3) is the time when the cover ceases: *Kusel v Atkin, The Catariba* [1997] 2 Lloyd's Rep 749. In respect of successive losses the pecuniary loss in respect of which the indemnity applies is the actual reduced value of the vessel at that time (ie the cumulative depreciation of the vessel's value at the time of termination of cover). By the express terms of the Marine Insurance Act 1906 s 69(3) that measure of indemnity may in turn be capped by whichever is the lower of the reasonable cost of repairing the damage and the insured value of the vessel: *Kusel v Atkin, The Catariba* supra.

10 Where it would not have been possible to repair the ship before a certain date, the cost of repairs, for the purposes of this rule, is the figure appropriate to that date: *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089.

11 Marine Insurance Act 1906 s 69(3). See also PARA 448 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/448. Ship sold unrepaired.

448. Ship sold unrepaired.

The third of the statutory rules as to the measure of indemnity in the case of the partial loss of a ship¹ deals only with the case where the ship has not been repaired and has not been sold in her damaged state during the risk. Where, after sustaining an average loss, the ship is sold by her owner unrepaired, he is entitled to recover the estimated cost of the repairs less the usual deduction², not exceeding the depreciation in the vessel's value³.

1 I.e. the Marine Insurance Act 1906 s 69(3): see PARA 447 text to notes 8-11 ante. As to the measure of indemnity see PARA 441 ante.

2 As to the customary deductions see PARA 449 post.

3 This was decided by a majority in *Pitman v Universal Marine Insurance Co* (1882) 9 QBD 192, CA (Brett LJ dissenting, being of opinion that the estimated cost of repairs was in all cases the measure of the loss). See also *Bristol Steam Navigation Co Ltd v Indemnity Mutual Marine Insurance Co* (1887) 6 Asp MLC 173, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/449. Deducting one-third new for old.

449. Deducting one-third new for old.

It has been customary to deduct one-third from the whole expense, both of labour and materials which the repairs have cost, unless the ship is a new ship. This deduction is termed 'deducting one-third new for old', and is made because the repairs will generally make the ship a better and more valuable vessel than she was before she was damaged¹. This rule, however, is subject to certain exceptions and modifications which are sometimes expressed in clauses contained in the policy, or by reference to the York-Antwerp Rules 1974², and in modern policies on hulls it is excluded altogether³.

The deduction is not made in the case of a new ship on her first voyage, but whether the vessel is or is not on her first voyage is a question of fact. If any general principle at all can be laid down, it is that she is on her first voyage at the time of the damage if the damage takes place at any part of what may be considered an integral voyage out and home at the commencement of which she was a new ship, taking into account the charterparty, the policy and all the facts of the case⁴.

Again, if an old ship is newly repaired immediately before sailing on the voyage on which the loss takes place, and the loss falls exclusively on the new materials, the deduction of one-third new for old seems not to apply⁵. It is otherwise if the damage can only be proved to fall chiefly on the new part⁶.

Where old materials are thrown aside in making the repairs, the practice in England is first to deduct the third, and then to deduct the value of the old materials, and this seems on principle to be the correct rule⁷. It is also the English practice to make the same deduction for any increased expenditure which may be incurred in raising funds for the repairs, such as the marine interest on a bottomry bond, but this practice seems inconsistent with principle, inasmuch as the interest has not any effect in enhancing the ship's value⁸.

1 As to the operation of this rule see *Aitchison v Lohre* (1879) 4 App Cas 755 at 762, HL, per Lord Blackburn.

2 As to the York-Antwerp Rules 1974 see PARA 426 note 1 ante.

3 See the Institute Time Clauses (Hulls) cl 14; the Institute Voyage Clauses (Hulls) cl 12; the Institute War and Strikes Clauses (Hulls--Time) cl 2; and the Institute War and Strikes Clauses (Hulls--Voyage) cl 2. As to the Institute Clauses generally see PARA 330 ante.

4 *Fenwick v Robinson* (1828) 3 C & P 323; *Pirie v Steele* (1837) 8 C & P 200.

5 Stevens's Essay on Average in Marine Insurance 172.

6 *Poingdestre v Royal Exchange Assurance Corp'n* (1826) Ry & M 378. The deduction 'one-third new for old' will not be made in certain cases where the assured by no fault of his own, by reason of the ship never coming into his possession again, never derives any benefit from the repairs: *Da Costa v Newnham* (1788) 2 Term Rep 407 (default of insurers); cf *Humphreys v Union Insurance Co* (1824) 3 Mason 429 (American) (shipowner in default).

7 Arnould on Marine Insurance (16th Edn) s 1119.

8 Arnould on Marine Insurance (16th Edn) s 1119; cf *Rosetto v Gurney* (1851) 11 CB 176.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/450. Expenses of removal.

450. Expenses of removal.

It is sometimes reasonably necessary to remove a vessel from a port of distress to another port for the purpose of repairing her. In such a case the expenses incurred in and about the removal are in practice made payable by the insurers, and this practice seems right, inasmuch as these expenses being necessary in order to repair the vessel may be properly considered as part of the cost of repairs¹.

1 See the Rules of Practice of the Association of Average Adjusters, r D1.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/451. Expenses of docking for repairs.

451. Expenses of docking for repairs.

In cases where repairs of damage for which the insurers are liable and repairs the cost of which has to be borne by the owners (such as wear and tear) are executed simultaneously, the question arises whether the insurer is or is not liable for the whole of the expenses which would have been necessary for repairing the damage.

In general, the insurers are liable for all expenses incurred as a result of the operation of perils insured against and are not entitled to make any deduction on the ground that the shipowner has availed himself of the ship being in dock as a convenient opportunity for doing repairs or other work for which the insurers are not liable. Thus, where during the voyage insured a vessel is damaged by a peril insured against, and is put into dry dock for necessary repairs, and the owners, without causing delay or increased dock expenses, take advantage of her being in dry dock to have the survey made for renewing her classification, the expenses of getting her into and out of dock, as well as the necessary expenses incurred in having the use of the dock, will fall on the insurers alone, and will not be apportioned between them and the owners¹. If, however, part of the expenditure would have been necessary in any event as a result of matters in respect of which the assured is not insured under the policy, the insurers can, it seems, make a deduction². Dry docking dues are part of the reasonable cost of repairs³.

¹ *Ruabon Steamship Co v London Assurance* [1900] AC 6, HL; Rules of Practice of the Association of Average Adjusters, r D5.

² *Marine Insurance Co v China Transpacific Steamship Co (Vancouver Case)* (1886) 11 App Cas 573, HL; see also *Ruabon Steamship Co v London Assurance* [1900] AC 6 at 16, HL. See, however, *The Carslogie* [1952] AC 292, [1952] 1 All ER 20, HL (a collision action).

³ *The Medina Princess* [1965] 1 Lloyd's Rep 361 at 523.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/452. Nature of repairs.

452. Nature of repairs.

As regards the repairs themselves, the assured is entitled to have his ship repaired with materials and workmanship corresponding to the original work, and if the repairs are done in such a manner that the ship is a less valuable ship than she was originally, the assured is entitled to claim, in addition to the cost of repairs, compensation for the diminution of the ship's value¹.

¹ *Agenoria Steamship Co v Merchants Marine Insurance Co* (1903) 8 Com Cas 212 at 217. See the Marine Insurance Act 1906 s 69(2): para 447 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/453. Successive losses.

453. Successive losses.

Unless the policy otherwise provides, and subject to the provisions of the Marine Insurance Act 1906, the insurer is liable for successive losses, even though the total amount of those losses may exceed the sum insured¹. Thus, if a ship is actually repaired during the currency of the policy and is afterwards, but before the expiration of the policy, totally lost before arriving at her port of destination on the insured voyage, the cost of the repairs may be recovered in addition to the total loss². As an exception to this rule, where, under the same policy, a partial loss which has not been repaired or otherwise made good is followed by a total loss, the assured can only recover in respect of the total loss³, the particular average loss being merged in the subsequent total loss. It follows that it is only at the moment of the expiration of the policy that the insurer's liability for a partial loss is definitely determined⁴. Thus, if a ship warranted free from capture sustains an average loss and is then captured before any repairs are done, the insurer would not be liable at all under the policy; he would not be liable for the average loss, because it is merged in the total loss, nor for the total loss by capture, because the insurance was warranted free of capture⁵.

This doctrine of merger applies only to a case where the partial and total loss both occur during the currency of the same policy⁶.

Claims under the suing and labouring clause⁷ are not affected by the fact that the insurer has paid other claims on successive losses up to or exceeding the sum insured⁸.

Where a vessel becomes a constructive total loss by reason of the operation of an insured peril, and almost immediately afterwards becomes an actual total loss by reason of the operation of an uninsured peril, the insured remains entitled to recover for the constructive total loss⁹.

1 Marine Insurance Act 1906 s 77(1). This provision refers only to successive repaired losses: *Kusel v Atkin, The Catariba* [1997] 2 Lloyd's Rep 749.

2 This rule, however, does not apply to repairs which the owner has not paid for, and for which he does not remain liable, eg when their cost has been defrayed with money raised on bottomry: *The Dora Forster* [1900] P 241.

3 Marine Insurance Act 1906 s 77(2).

4 *Knight v Faith* (1850) 15 QB 649 at 668 per Lord Campbell CJ.

5 *Livie v Janson* (1810) 12 East 648.

6 Thus, suppose a ship is insured by two policies, one 'at and from London to Calcutta and for 30 days after arrival', and the other a valued policy 'at and from Calcutta to England'. During the currency of the first policy she sustains serious damage and is kept afloat only by continual pumping until she arrives at Calcutta, where she is placed in dry dock for repairs. After part of the repairs have been carried out and after the expiration of the first policy she is totally destroyed by fire when in dry dock. In these circumstances the assured would be entitled to recover under the first policy the full amount of the partial loss repaired or unrepaired, and under the second valued policy he would be entitled to recover the full amount insured as for a total loss: *Lidgett v Secretan* (1871) LR 6 CP 616. Cf *Barker v Janson* (1868) LR 3 CP 303; *Woodside v Globe Marine Insurance Co* [1896] 1 QB 105. Contrast *British and Foreign Insurance Co Ltd v Wilson Shipping Co Ltd* [1921] 1 AC 188, HL (ship damaged by marine risks and, while unrepaired, totally lost by war risks: partial loss merged in total loss).

7 As to the suing and labouring clause see PARAS 435-438 ante.

8 Marine Insurance Act 1906 s 77(2) proviso.

9 *Kastor Navigation Co Ltd v AGF MAT, The Kastor Too* [2002] EWHC 2601 (Comm), [2003] 1 All ER (Comm) 277, [2003] Lloyd's Rep IR 262.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/454. Partial loss of freight.

454. Partial loss of freight.

Subject to any express provision in the policy, where there is a partial loss of freight¹, the measure of indemnity² is such proportion of the sum fixed by the policy in the case of a valued policy³, or of the insurable value in the case of an unvalued policy⁴, as the proportion of freight lost by the assured bears to the whole freight at the assured's risk under the policy⁵. Although it is only the net freight that is really lost by the assured, the insurable value is the gross freight at risk, plus the charges of insurance⁶.

Freight is generally insured in valued policies, and in such case, where only part of the full cargo to which the valuation was intended to apply was on board or contracted for at the time of the loss, the insurer is liable only to pay on such proportion of the amount insured as the part of the cargo on board, or contracted for, bears to the full intended cargo⁷. Where the policy on freight is an unvalued policy, and only part of the cargo is on board or contracted for at the time of the loss, and that part is totally lost, the insurer is liable to pay only the actual amount of freight which would have been earned by the carriage of that part, together with premiums and cost of insurance⁸.

1 For the meaning of 'freight' see PARA 296 ante.

2 As to the measure of indemnity see PARA 441 ante.

3 For the meaning of 'valued policy' see PARA 222 ante.

4 For the meaning of 'unvalued policy' see PARA 222 ante.

5 Marine Insurance Act 1906 s 70.

6 Ibid s 16(2); and see PARA 432 ante. This rule was first established by evidence of usage: see *Palmer v Blackburn* (1822) 1 Bing 61; *United States Shipping Co v Empress Assurance Corp* [1907] 1 KB 259 (affd without deciding any question of law [1908] 1 KB 115, CA).

7 *Forbes v Aspinall* (1811) 13 East 323; *Denoon v Home and Colonial Assurance Co* (1872) LR 7 CP 341; *The Main* [1894] P 320; cf *Tobin v Harford* (1864) 17 CBNS 528, Ex Ch (policy on cargo).

8 *Forbes v Cowie* (1808) 1 Camp 520; *Forbes v Aspinall* (1811) 13 East 323 at 326 per Lord Ellenborough CJ. As to commencement of risk on freight see further PARAS 318-320 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/455. Third party liability.

455. Third party liability.

Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity¹, subject to any express provision in the policy, is the amount paid or payable by him to the third party in respect of that liability².

As already mentioned, a carrier of goods has, as a bailee, an insurable interest in the goods themselves, but he may also expressly insure against the liability he may incur to the owner for loss³.

1 As to the measure of indemnity see PARA 441 ante.

2 Marine Insurance Act 1906 s 74.

3 See PARA 370 ante. As to whether an insurance by a carrier is an insurance on the goods or an insurance against liability to their owners see *Cunard Steamship Co Ltd v Marten* [1903] 2 KB 511, CA. As to the construction of clauses effected in policies by carriers in respect of goods carried by them see *Crowley v Cohen* (1832) 3 B & Ad 478; *Joyce v Kennard* (1871) LR 7 QB 78 (distinguished in *Holman & Sons Ltd v Merchants Marine Insurance Co Ltd* [1919] 1 KB 383, cited in PARA 216 note 1 ante); *Kuehne and Nagel Inc v F W Baiden* [1977] 1 Lloyd's Rep 90, NY CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/456. Measure of indemnity for general average and salvage charges.

456. Measure of indemnity for general average and salvage charges.

Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution¹, the measure of indemnity² is the full amount of that contribution if the subject matter liable to contribution is insured for its full contributory value³. If that subject matter is not insured for that value, or if only part of it is insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss⁴ which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute⁵.

Where the insurer is liable for salvage charges⁶, the extent of his liability must be determined on the like principle⁷.

The contributory value and the insurable value may be different, inasmuch as the contributory value is generally the value at the port of adjustment, whereas the insurable value is the value at the commencement of the voyage, and the rule provides for the case where that difference exists⁸.

1 As to general average contribution see PARA 420 et seq ante.

2 As to the measure of indemnity see PARA 441 ante.

3 Marine Insurance Act 1906 s 73(1).

4 As to particular average see PARA 433 et seq ante.

5 Marine Insurance Act 1906 s 73(1).

6 As to salvage charges see PARA 434 ante.

7 Marine Insurance Act 1906 s 73(2).

8 The above principle was applied in *Balmoral Steamship Co v Marten* [1902] AC 511, HL; affg [1901] 2 KB 896, CA. As to the port of adjustment see PARA 428 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(11) MEASURE OF LOSS FOR WHICH INSURERS ARE LIABLE/(v) Measure of Indemnity/457. Measure of indemnity in other cases.

457. Measure of indemnity in other cases.

Where there has been a loss in respect of any subject matter not expressly provided for in the statutory provisions previously mentioned¹, the measure of indemnity is to be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case².

1 I.e. the Marine Insurance Act 1906 ss 67-74: see PARAS 441-456 ante.

2 Ibid s 75(1).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/458. Distinction between actual and constructive total loss.

(12) TOTAL LOSS

(i) Actual Total Loss

458. Distinction between actual and constructive total loss.

A loss may be either total or partial; any loss other than a total loss is a partial loss¹. A total loss may be either an actual total loss or a constructive total loss².

Where the subject matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured³ is irretrievably deprived of it, there is an actual total loss⁴.

Subject to any express provision in the policy, where the subject matter insured⁵ is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred, there is a constructive total loss⁶.

1 Marine Insurance Act 1906 s 56(1).

2 Ibid s 56(2).

3 As to the use of the term 'the assured' see PARA 216 note 1 ante.

4 Marine Insurance Act 1906 s 57(1), which is evidently intended to reproduce substantially the statement in Lord Abinger's judgment in *Roux v Salvador* (1836) 3 Bing NC 266, Ex Ch, that 'there is an absolute total loss where the thing insured is wholly destroyed or annihilated by the perils insured against or is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the underwriter to procure its arrival'.

5 In the case of insurance on goods under a voyage policy, the subject matter insured includes the adventure and is not limited to the goods themselves: *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL; approved and distinguished in *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50, [1941] 3 All ER 62, HL. Consequently, if the adventure is frustrated by an insured peril, the assured may abandon it and recover for a constructive total loss on the ground that the actual total loss of the subject matter insured appears to be unavoidable, even though the goods themselves are undamaged and in his control: *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* supra. In *Mitsui v Mumford* [1915] 2 KB 27 at 32, Bailhache J expressed the opinion that in considering whether there had been a loss under a policy on timber stored in warehouses in Antwerp it was 'right to take into account considerations similar to those which one would take into account in determining a question of constructive total loss under a marine policy'. In *Campbell and Phillips Ltd v Denman* (1915) 21 Com Cas 357, Bray J treated the provision in the text as applicable to a policy on goods at Antwerp. In *Moore v Evans* [1918] AC 185, HL, however, Lord Atkinson criticised the judgments in these two cases and expressed the opinion that the rules as to constructive loss under a marine policy had no application to the policy there in question, which was on jewellery 'in or upon any premises or place whatsoever or being carried or in transit by land or water in the United Kingdom or Europe, or in transit by sea from any port or place in the United Kingdom or Europe'.

6 Marine Insurance Act 1906 s 60(1). As to the commercial considerations on which the doctrine of constructive total loss is founded see *Roux v Salvador* (1836) 3 Bing NC 266 at 286-287, Ex Ch, per Lord Abinger CJ; and see also *Goss v Withers* (1758) 2 Burr 683 per Lord Mansfield CJ; *Hamilton v Mendes* (1761) 2 Burr 1198; *Roura and Forgas v Townend* [1919] 1 KB 189 at 194. As to constructive total loss see further PARA 468 post. The Marine Insurance Act 1906 s 60 is a definition section which (subject to any express provision in the policy) circumscribes completely the conception of constructive total loss: *Irvin v Hine* [1950] 1 KB 555 at 568, [1949] 2 All ER 1089 at 1091 per Devlin J. If these conditions are fulfilled, there is a constructive total loss, and giving due notice of abandonment is only a condition precedent to recovery from the insurer in respect of the loss: *Robertson v Petros M Nomikos Ltd* [1939] AC 371, [1939] 2 All ER 723, HL. This distinction is important where the insurer's liability in respect of the loss of the subject matter insured (eg freight) is made to depend on

the constructive total loss of another subject matter (eg the ship). Thus, where profit on charter was insured 'against total and/or constructive total loss of steamer only', and the steamer was captured, the assured were held entitled to recover for a loss of their profit on charter, although the shipowners had given no notice of abandonment, the steamer not being insured: *Roura and Forgas v Townend* supra. Cf *Robertson v Petros M Nomikos Ltd* supra. As to notice of abandonment see PARAS 459, 469, 478-485 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/459. Need for abandonment and notice thereof.

459. Need for abandonment and notice thereof.

In the cases covered by the definition of an actual total loss¹, as it is impossible for the assured to treat the loss as a partial loss, he has no election to make and therefore need not give any notice of abandonment².

On the other hand, in the case of a constructive total loss, the assured must give notice of abandonment to the insurer before he can claim as for total loss³.

1 See PARA 458 ante.

2 Marine Insurance Act 1906 s 57(2); and see PARA 458 note 4 ante. See also *Roura and Forgas v Townend* [1919] 1 KB 189; *Norwich Union Fire Insurance Society Ltd v Price Ltd* [1934] AC 455 at 464, PC; *Kastor Navigation Co Ltd v AGF MAT, The Kastor Too* [2002] EWHC 2601 (Comm), [2003] 1 All ER (Comm) 277, [2003] Lloyd's Rep IR 262.

3 See PARAS 469, 478-485 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/460. Actual total loss of ship by destruction or damage.

460. Actual total loss of ship by destruction or damage.

In accordance with the first part of the statutory definition of an actual total loss¹, if a ship is so wrecked and damaged as to lose her character as a ship completely and becomes a mere collection of materials which could be used for rebuilding her, there is an actual total loss of the ship, even if the wreck is brought to the port of destination². Again, if a ship is so damaged that she cannot sail without repairs and cannot be taken to a port at which the necessary repairs could be executed, there is an actual total loss³. On the other hand, although the ship is so seriously damaged as not to be worth repairing, if she can still be taken to a port and repaired there is no actual total loss unless she is so broken up as to have completely lost her character as a ship⁴.

1 See the Marine Insurance Act 1906 s 57(1); and PARA 458 ante.

2 *Cambridge v Anderton* (1824) 2 B & C 691. For the facts of this case see the report in 1 C & P 213. The judgment, which proceeded on the assumption (whether right or wrong) that the ship had lost her character as a ship, and had become a mere congeries of planks, has been followed in *Levy & Co v Merchants Marine Insurance Co* (1885) 1 TLR 228. See also, on this point, *Allen v Sugrue* (1828) 8 B & C 561 at 564 per Lord Tenterden CJ, better reported in Dan & LI 188 at 192; *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159.

3 *Barker v Janson* (1868) LR 3 CP 303 per Willes J; *Moss v Smith* (1850) 9 CB 94 at 102 per Maule J.

4 *Barker v Janson* (1868) LR 3 CP 303 per Willes J; *Martin v Crockatt* (1811) 14 East 465 at 466; *Bell v Nixon* (1816) Holt NP 423; *Fleming v Smith* (1848) 1 HL Cas 513; *Knight v Faith* (1850) 15 QB 649. For the effect of a constructive total loss followed by a justifiable sale see PARA 465 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/461. Actual total loss of goods by destruction or damage.

461. Actual total loss of goods by destruction or damage.

If insured goods are so damaged by the perils insured against that in a commercial sense they have lost their original character and are not saleable under their ordinary description, or exist only in the form of a nuisance, this is an actual total loss, even if they have reached their port of destination. Thus if hides which are insured are so damaged by perils insured against that they have changed their form and can be sold only as glue, manure or ashes, there is an actual total loss of the hides whether or not they have reached their port of destination¹.

Where goods reach their destination in specie, but by reason of obliteration of marks or otherwise they are incapable of identification, the loss, if any, is partial and not total, all the owners of the goods which cannot be identified becoming tenants in common².

Perishable goods are generally insured 'free of average'³, and such a clause amounts to a stipulation that the insurer is not to be liable for anything short of a total loss. Thus the question whether the insurer is liable for a total loss of the insured goods generally arises in cases where they are insured free of average. Whether the loss is to be held total or partial within the meaning of the clause depends entirely on the general principles regulating the matter, for the clause does not in the least vary the rules which determine whether a loss is partial or total, or whether notice of abandonment need be given to make the insurer liable⁴.

On the other hand, no amount of damage to the insured goods will constitute an actual total loss unless their damage involves their total destruction in specie. Thus, if wheat valued at £1,000 is insured free of average from Waterford to Liverpool, and the ship is run aground to prevent her sinking and in consequence her hull is completely under water every high tide, if any portion of the wheat can be got out of the ship and can be sent on to Liverpool so as to be sold there as wheat, although at a price less than its freight, the assured cannot recover as for a total loss without giving notice of abandonment⁵.

1 *Roux v Salvador* (1836) 3 Bing NC 266 at 277-278, Ex Ch; *Burnett v Kensington* (1797) 7 Term Rep 210 at 222; *Dyson v Rowcroft* (1803) 3 Bos & P 474 at 476, overruling the decision of Lord Mansfield in *Cocking v Fraser* (1785) 4 Doug KB 295; *Cologan v London Assurance Co* (1816) 5 M & S 447 at 455; *Asfar & Co v Blundell* [1895] 2 QB 196 (affd [1896] 1 QB 123, CA); *Saunders v Baring* (1876) 34 LT 419; *Montreal Light, Heat and Power Co v Sedgwick* [1910] AC 598, PC (cement destroyed by barge being submerged, a total loss of the goods 'by total loss of vessel'); *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 (steel injection moulds so badly damaged by rust as to have only scrap value; held that this was actual total loss).

2 Marine Insurance Act 1906 s 56(5); *Spence v Union Marine Insurance Co* (1868) LR 3 CP 427.

3 See further PARA 439, especially note 1 ante.

4 *Roux v Salvador* (1836) 3 Bing NC 266 at 278, Ex Ch. As to what amounts to a total loss of disbursements under a policy on disbursements 'free from all average' see *Lawther v Black* (1901) 6 Com Cas 196, CA. As to the cases in which notice of abandonment is necessary see PARA 469 post.

5 *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38; *Cunningham v Maritime Insurance Co* [1899] 2 IR 257; *Hedburg v Pearson* (1816) 7 Taunt 154; *Navone v Haddon* (1850) 9 CB 30; *M'Andrews v Vaughan* (1793) 1 Park's Marine Insurances (8th Edn) 252; *Mason v Skurray* (1780) 1 Park's Marine Insurances (8th Edn) 253, overruling the decision of Yorke CJ at Nisi Prius in *Boyfield v Brown* (1736) 2 Stra 1065; *Glennie v London Assurance Co* (1814) 2 M & S 371. But as to the effect of a justifiable sale see PARA 465 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/462. Total loss of part of goods.

462. Total loss of part of goods.

In general, there is no total loss of the insured goods unless there is a total loss of all the goods¹. The only exception to this rule is where the contract contained in the policy is severable, either by reason of express stipulation in the policy or because the goods are separately valued, or because the insured goods consist of separate articles wholly distinct in their nature so that they must be considered as separately insured².

1 *Ralli v Janson* (1856) 6 E & B 422, Ex Ch, overruling *Davy v Milford* (1812) 15 East 559, and the dicta in some earlier cases. The de minimis rule will be applied in calculating whether there is a total loss of all the goods: *Boon and Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd* [1975] 1 Lloyd's Rep 452, Malaysia HC (668 steel pipes insured, of which all except 12 fell into the sea; held, not an actual total loss because the 12 were too high a proportion to be capable of being dismissed as a matter de minimis).

2 See *Duff v Mackenzie* (1857) 3 CBNS 16; the Marine Insurance Act 1906 s 76(1); and PARA 439 ante. See also *Hills v London Assurance Corpn* (1839) 5 M & W 569; *Entwistle v Ellis* (1857) 2 H & N 549; *Wilkinson v Hyde* (1858) 3 CBNS 30; *Fabrique de Produits Chimiques SA v Large* [1923] 1 KB 203.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/463. Actual total loss by deprivation.

463. Actual total loss by deprivation.

By the second part of the statutory definition, there is an actual total loss where the assured is irretrievably deprived of the subject matter insured¹. Thus, if the ship founders in mid-ocean, and there is no chance of raising her or the goods on board, there is an actual total loss of the ship and goods. If, on the other hand, there is a reasonable chance of raising the ship or goods, although only at very great expense, this is not an actual, but only a constructive total loss². Again, if the subject matter insured is captured, condemned and sold, there is an actual total loss³.

1 See the Marine Insurance Act 1906 s 57(1); and PARA 458 ante. See *Panamanian Oriental Steamship Corpn v Wright* [1970] 2 Lloyd's Rep 365 (vessel ordered to be confiscated by special military court was not an actual total loss as it had not been shown that the assured was irretrievably deprived of her) (revsd on other grounds [1971] 2 All ER 1028, [1971] 1 WLR 882, CA).

2 *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38; *Doyle v Dallas* (1831) 1 Mood & R 48; *Kemp v Halliday* (1866) LR 1 QB 520, Ex Ch; *Blairmore Co Ltd (Sailing Ship) v Macredie* [1898] AC 593, HL; *Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co* [1927] AC 698, PC. As to constructive total loss see further PARA 468 et seq post.

3 *Stringer v English and Scottish Marine Insurance Co* (1869) LR 4 QB 676; affd (1870) LR 5 QB 599, Ex Ch. Capture, without condemnation, is not an actual total loss, although it may constitute a constructive total loss: see *Marstrand Fishing Co Ltd v Beer* [1937] 1 All ER 158 at 163 per Porter J.

UPDATE

463 Actual total loss by deprivation

NOTE 3--*Masefield AG v Amlin* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 (assured not irretrievably deprived of property where information in public domain showed all interested persons fully aware vessel seized by pirates likely to be recovered on payment of ransom).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/464. Date of loss of missing ship.

464. Date of loss of missing ship.

Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed¹; but in order to recover on the policy the assured must prove a loss that has occurred within the period of insurance, there being no presumption that the loss took place at a particular time².

What is a reasonable time is a question of fact³. For instance, if the ship has met with some disaster or encountered a violent storm during the insured period, or if she has failed to arrive at her destination within the usual time, a loss during the insured period may be presumed⁴.

1 Marine Insurance Act 1906 s 58. See further PARA 332 text and notes 10, 11 ante.

2 *Houstman v Thornton* (1816) Holt NP 242.

3 Marine Insurance Act 1906 s 88.

4 *Reid v Standard Marine Assurance Co Ltd* (1886) 2 TLR 807; cf *Re Rhodes v Rhodes* (1887) 36 ChD 586 at 591 (presumption of death); and CIVIL PROCEDURE vol 11 (2009) PARAS 1100-1101. As to whether in time of war this loss may be presumed to be by war or by marine risks see *Macbeth & Co v King* (1916) 86 LJB 1004; and PARA 338 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(i) Actual Total Loss/465. Constructive total loss followed by justifiable sale.

465. Constructive total loss followed by justifiable sale.

Where there is a constructive total loss of the subject matter insured, whether ship or goods, and this is followed by a justifiable sale by the master, then, at any rate if the news of the loss and of the sale reach the assured at the same time, no notice of abandonment need be given, and therefore the loss is treated as an actual total loss¹. It is important to observe, however, that it is not the sale alone which entitles the assured to recover for a total loss without notice of abandonment, for there is no such head in insurance law as loss by sale². The true ground is that the justifiable sale has deprived the owner of his property and there is nothing to abandon, and therefore no need for notice of abandonment³.

If perishable goods are so damaged that it is impossible to carry them to their destination, and they are left at a port of distress without being sold there, it seems that notice of abandonment should be given, as the subject matter insured is still in existence, and opportunity should be given to the insurer to deal with it as he thinks proper⁴.

The Marine Insurance Act 1906 contains no express provision as to a constructive total loss being followed by a justifiable sale, but the law, as stated above, may be deduced from the provision for the case where the assured is irretrievably deprived of the subject matter insured⁵, and also from the provision that notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him⁶.

Whether the sale is justifiable or not is a question of fact⁷. If, for example, the master cannot obtain sufficient funds for repairing the ship and it appears that he will not be able to obtain them before the ship becomes an actual total loss, he will be justified in selling her, and, after the sale, the loss may be treated as an actual total loss⁸. On the other hand, even where a constructive total loss has taken place, followed by a sale, the assured may forfeit his claim to recover for a total loss by his own conduct in electing to take the proceeds of the sale instead of making his claim against the insurers, if he thereby alters the position of facts so as to affect their interests⁹.

1 *Roux v Salvador* (1836) 3 Bing NC 266, Ex Ch; *Cossman v West*, *Cossman v British America Assurance Co* (1887) 13 App Cas 160, PC; *Cobequid Marine Insurance Co v Barteaux* (1875) LR 6 PC 319; *Navone v Haddon* (1850) 9 CB 30 at 44 per Maule J; *Farnworth v Hyde* (1866) LR 2 CP 204, Ex Ch; *Saunders v Baring* (1876) 34 LT 419; *Rankin v Potter* (1873) LR 6 HL 83 at 102, 157; *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222; see also *Knight v Faith* (1850) 15 QB 649, and the comments on that case by Blackburn J in *Rankin v Potter* supra at 130. As to constructive total loss becoming actual by continuance of perils see *Levy & Co v Merchants Marine Insurance Co* (1885) 52 LT 263.

2 *Gardner v Salvador* (1831) 1 Mood & R 116 at 117 per Bayley B; *Navone v Haddon* (1850) 9 CB 30.

3 See the Marine Insurance Act 1906 s 62(7); and *Kaltenbach v Mackenzie* (1878) 3 CPD 467 at 480, CA, per Cotton LJ; *Norwich Union Fire Insurance Society v Price Ltd* [1934] AC 455, PC, where money paid under a mistake of fact on the footing of an actual loss was held recoverable. On this principle, where an insurer has reinsured his risk, no notice of abandonment need be given to his insurer, inasmuch as there is nothing to abandon: see the Marine Insurance Act 1906 s 62(9).

4 *Kaltenbach v Mackenzie* (1878) 3 CPD 467, CA; cf *Mansell & Co v Hoade* (1903) 20 TLR 150 (cattle slaughtered by reason of quarantine regulations preventing their being landed).

5 See the Marine Insurance Act 1906 s 57(1); and PARA 458 ante.

6 Ibid s 62(7). As the master has no authority to sell the ship or the goods unless the danger of a total loss is so imminent that there is no time for him to communicate with the owners, considerable caution must be used in applying the earlier cases on the subject on account of the enormous increase in the facilities for communication. It must also be noted that where the assured receives information of the loss before there has been any sale, he must, in general, at once give notice of abandonment to the insurers in order to be entitled to claim for a total loss: see *Kaltenbach v Mackenzie* (1878) 3 CPD 467, CA. As to this point see PARA 468 et seq post.

7 For the law as to the master's authority to sell ship or cargo in cases of necessity see *Hunter v Parker* (1840) 7 M & W 322; *Robertson v Clarke* (1824) 1 Bing 445; *Mount v Harrison* (1827) 4 Bing 388; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 508-513; SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 440-444.

8 *Somes v Sugrue* (1830) 4 C & P 276 at 283 per Tindal CJ; *Morris v Robinson* (1824) 3 B & C 196; *Cannan v Meaburn* (1823) 1 Bing 243. This is provided the assured first hears of the loss and the sale at the same time: see text and note 1 supra.

9 *Mitchell v Edie* (1787) 1 Term Rep 608; and see *Roux v Salvador* (1836) 3 Bing NC 266 at 286, Ex Ch, per Lord Abinger CJ; *Allwood v Henckell* (1795) 1 Park's Marine Insurances (8th Edn) 399; *Saunders v Baring* (1876) 34 LT 419 at 421.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(ii) Total Loss of Freight/466. Instances of total loss of freight.

(ii) Total Loss of Freight

466. Instances of total loss of freight.

There is a total loss of freight¹ where, by perils insured against², the right to freight is destroyed and the assured is irretrievably deprived of it³. Thus, there may be a total loss of freight where the shipowner is physically prevented from performing the contract of affreightment by a total loss of ship or cargo caused by perils insured against⁴. As the hull and the freight policies are wholly independent of one another, there may also be a total loss of freight through frustration of the charterparty by perils insured against even though there has been no total loss under the hull policies⁵. Such frustration may occur, for example, through delay⁶, or through the ship suffering damage sufficiently extensive to render it commercially impracticable to incur the expense of repair⁷.

In all these cases the right to freight is destroyed. For the same reason there is a total loss under a policy on commissions or profits if the goods are totally lost by perils insured against⁸.

1 It is believed that there is no case which has been decided on the basis of constructive, as distinct from actual, total loss of freight, and the question of constructive total loss is therefore not dealt with separately here. It is, however, not necessarily impossible that there should be such a loss, and in *Rankin v Potter* (1873) LR 6 HL 83 at 102-103, Brett J indicated situations in which he considered that notice of abandonment should be given. For a full discussion of the concept of constructive total loss of freight see Arnould on Marine Insurance (16th Edn) s 1233 et seq. For the meaning of 'freight' when used to describe the subject matter of the policy see PARA 296 ante.

2 As to the perils insured against see generally para 330 ante.

3 See the Marine Insurance Act 1906 s 57(1). If, owing to the outbreak of war, it becomes illegal for the assured to earn the only freight in respect of which he has a contractual interest, and no other freight is obtainable on the insured voyage, there is an actual total loss by 'restraint of princes': *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184.

4 *Horncastle v Suart* (1806) 7 East 400 (embargo and seizure); *Mackenzie v Shedden* (1810) 2 Camp 431 (captive); *Rankin v Potter* (1873) LR 6 HL 83 (constructive total loss of vessel before commencement of insured voyage); *Papadimitriou v Henderson* [1939] 3 All ER 908 (capture: insurance of 'anticipated freight').

5 See *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291 at 304, CA, per Lord Wright MR, and *Vrondissis v Stevens* [1940] 2 KB 90 at 96-97, [1940] 3 All ER 74 at 77-78 per Atkinson J. The question whether or not the shipowner has given notice of abandonment to hull insurers is thus irrelevant: *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 381, [1939] 2 All ER 723 at 727, HL, per Lord Wright.

6 *Jackson v Union Marine Insurance Co Ltd* (1873) LR 8 CP 572 (affd (1874) LR 10 CP 125, Ex Ch); *Re Jamieson and Newcastle Steamship Freight Insurance Association* [1895] 2 QB 90, CA; and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 590 et seq. Such a loss will not, however, be recoverable if the policy contains a clause excepting any claim 'consequent on loss of time whether arising from a peril of the sea or otherwise' (see now eg the Institute Time Clauses (Freight) cl 15 and the Institute Voyage Clauses (Freight) cl 11; incorporated respectively by the Institute War and Strikes Clauses (Freight--Time) cl 2; and the Institute War and Strikes Clauses (Freight--Voyage) cl 2; see also PARA 330 ante): *Bensaude v Thames and Mersey Marine Insurance Co* [1897] AC 609, HL; *Turnbull, Martin & Co v Hull Underwriters' Association* [1900] 2 QB 402; *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA* [1978] AC 853, [1977] 1 All ER 625, HL. In *Russian Bank for Foreign Trade v Excess Insurance Co Ltd* [1918] 2 KB 123, Bailhache J held that although the closing of the Dardanelles by Turkey during the First World War was such a restraint of princes as would, in the absence of a provision to the contrary in the policy, have given rise to a claim for constructive total loss, the assured was precluded from recovery because the policy contained a clause excluding all claims for delay. The decision was affirmed on other grounds (see [1919] 1 KB 39, CA) and distinguished in *Roura and Forgas v Townend* [1919] 1 KB 189. The effect of the clause was considered (though not decided) in *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086, CA, where Evershed MR reviewed the authorities and (doubting *Russian*

Bank for Foreign Trade v Excess Insurance Co Ltd supra) drew a distinction between cases in which lapse of time disposes of the bargain, in which event the clause bars a claim, and those in which the delay is relevant only to estimate correctly the extent of the peril and to ascertain the nature and quality of the accident. The question whether a claim is consequent upon loss of time is in each case one of fact: *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 377, [1939] 2 All ER 723 at 724, HL, per Lord Atkin.

7 *Moss v Smith* (1850) 9 CB 94; *Carras v London and Scottish Assurance Corp'n Ltd* [1936] 1 KB 291, CA; *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, [1936] 2 All ER 242, CA; *Vrondissis v Stevens* [1940] 2 KB 90, [1940] 3 All ER 74. See also *Assicurazioni Generali v Steamship Bessie Morris Co Ltd and Browne* [1892] 2 QB 652, CA (a charterparty case). The only repairs to be considered when estimating the expense of repair are those necessary to enable the vessel to carry the cargo to its destination: *Kulukundis v Norwich Union Fire Insurance Society* supra per Slessor LJ and Greene LJ, Scott LJ contra. The provision in the Institute Voyage Clauses (Freight) cl 12.2, and in the Institute Time Clauses (Freight) cl 16.2, that in ascertaining whether the vessel is a constructive total loss the insured value in the insurances on hull and machinery is to be taken as the repaired value, only applies where the assured's claim arises under the clause which provides that in the event of the total loss of the vessel, whether absolute or constructive, the amount insured by the freight policy is to be paid in full, and is irrelevant where there has been an actual total loss of freight by perils insured against, eg by the vessel missing her cancelling date because of perils of the sea.

The clauses cited above are incorporated respectively by the Institute War and Strikes Clauses (Freight--Voyage) cl 2; and the Institute War and Strikes Clauses (Freight--Time) cl 2.

8 Partial loss of bill of lading freight may be total loss of profit on charter: *Asfar & Co v Blundell* [1896] 1 QB 123, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(ii) Total Loss of Freight/467. Where freight is not totally lost.

467. Where freight is not totally lost.

A total loss of the vessel, whether actual or constructive, is not of itself, in the absence of express provision to that effect, sufficient to entitle the assured to recover for a total loss of freight, as it may be that freight is earned notwithstanding the loss of the ship. Thus if the vessel earns freight after being abandoned to hull insurers, the freight is not lost, even though the assured does not receive it¹. Again, there is no total loss of freight if the vessel is a total loss but the cargo is recovered and delivered to its destination². Similarly, there may be no total loss of freight where a ship has stranded outside the port of destination in such circumstances that the cargo can be unloaded into lighters and brought into port³.

The insurer is not liable for loss of freight unless the loss is proximately caused by the perils insured against⁴; he is therefore not liable if the loss was proximately caused by the assured's act⁵. However, if carriage in the original ship becomes impossible owing to the operation of perils insured against, failure by the shipowner to exercise his option to tranship the cargo and carry it to its destination does not result in a loss proximately caused by an act of the assured⁶.

1 *Scottish Marine Insurance Co of Glasgow v Turner* (1853) 1 Macq 334, HL; and cf *Robert S Besnard Barque Co Ltd v Murton* (1909) 101 LT 285. This hardship is excluded in practice by the introduction of an Institute Clause providing that in the event of the total loss of the vessel, whether actual or constructive, the amount insured must be paid in full, whether the vessel is fully or partly loaded, or in ballast, chartered or unchartered: *Coker v Bolton* [1912] 3 KB 315 at 320 per Hamilton J; *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 384, [1939] 2 All ER 723 at 729, HL, per Lord Wright. As to the clause now generally included see the Institute Voyage Clauses (Freight) cl 12.1; the Institute Time Clauses (Freight) cl 16.1; the Institute War and Strikes Clauses (Freight--Time) cl 2; and the Institute War and Strikes Clauses (Freight--Voyage) cl 2. As to the Institute Clauses generally see PARA 330 ante.

2 *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291 at 303, CA, per Lord Wright MR.

3 *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 18, [1936] 2 All ER 242 at 258, CA, per Greene LJ.

4 See PARA 348 ante.

5 See PARAS 358-364 ante; and *M'Carthy v Abel* (1804) 5 East 388; *Scottish Marine Insurance Co v Turner* (1853) 1 Macq 334, HL (abandonment of vessel to hull underwriters). Contrast *The Alps* [1893] P 109; *The Bedouin* [1894] P 1, CA (ship off-hire through unseaworthiness due to perils insured against: freight recoverable under policy), with *Inman Steamship Co v Bischoff* (1882) 7 App Cas 670, HL (exercise by charterer of option of abatement of freight in the event of ship becoming unseaworthy: loss of freight too remote a consequence of perils causing unseaworthiness).

6 *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 at 36 et seq, [1936] 2 All ER 242 at 271 et seq, CA, per Scott LJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/A. MEANING/468. Meaning of 'constructive total loss'.

(iii) Constructive Total Loss

A. MEANING

468. Meaning of 'constructive total loss'.

Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured¹ is reasonably abandoned² on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred³. Whether these conditions as to constructive total loss are or are not satisfied is in each case a question of fact⁴.

In particular⁵, there is a constructive total loss:

- 121 (1) where the assured is deprived of the possession of his ship or goods by a peril insured against, and:
 - 2
 - 1. (a) it is unlikely⁶ that he can recover the ship or goods, as the case may be; or
 - 2. (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered⁷; or
 - 3
- 122 (2) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing⁸ the damage would exceed the value of the ship when repaired⁹; or
- 123 (3) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival¹⁰.

There are thus three main grounds on which a constructive total loss may be founded. The first is the reasonable abandonment of the ship as described above¹¹. The second is that the assured may, by the perils insured against, be deprived of the possession of the insured property in circumstances which make it unlikely that he can recover it within a reasonable time¹²; thus it may be captured by the enemy, or by the assured's own government, or by pirates¹³, or a ship may be deserted by the master and crew. The third ground is that, although the assured may not be forcibly dispossessed of the insured property, it may be so damaged by the perils insured against that the high cost of repairing the damage or of carrying the goods to the port of destination makes it in a commercial sense impracticable to incur that cost¹⁴.

Modern standard Institute Clauses provide that if a vessel is the subject of capture, seizure, arrest, restraint, detainment, confiscation or expropriation and the assured has lost the free use and disposal¹⁵ of her for 12 months, the assured is deemed to have been deprived of possession without any likelihood of recovery¹⁶.

1 The 'subject matter' of a policy on goods includes the adventure and is not limited to the goods themselves: see PARA 458 note 5 ante.

2 'Abandoned' in this context means 'given up for lost', and not 'abandoned to underwriters', as it does elsewhere in the Marine Insurance Act 1906: *The Lavington Court* [1945] 2 All ER 357 per Scott LJ and Stable J, du Parc LJ dissenting.

3 Marine Insurance Act 1906 s 60(1); see also PARA 458 ante. The parties are at liberty to define, and do sometimes define, in the policy what is to be considered a constructive total loss: *Re Sunderland Steamship Co and North of England Iron Steamship Insurance Association* (1894) 11 TLR 106, CA; *Rowland and Marwood's Steamship Co v Marine Insurance Co* (1901) 6 Com Cas 160. *Holt Hill Sailing Ship Co v United Kingdom Marine Association* [1919] 2 KB 789 distinguished *Becker, Gray & Co v London Assurance Corp* [1918] AC 101, HL, on the ground that in the latter case the loss was not directly caused by the insured peril. In the case of a policy on freight such a frustration may give rise to an actual, not a constructive, total loss: *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184. See further as to constructive total loss of freight para 466 note 1 ante.

4 See eg *Farnworth v Hyde* (1866) LR 2 CP 204, Ex Ch; *Rodoconachi v Elliott* (1874) LR 9 CP 518, Ex Ch; *Mullett v Shedden* (1811) 13 East 304; *Mellish v Andrews* (1812) 15 East 13; *Stringer v English and Scottish Marine Insurance Co* (1870) LR 5 QB 599, Ex Ch.

5 See the Marine Insurance Act 1906 s 60(2). The definition contained in s 60 is exhaustive, subject to express provision in the policy: *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089. Some difficulty has been experienced in the past in determining the inter-relationship of the Marine Insurance Act 1906 s 60(1) and (2). It now appears to be clear that the two subsections do not contain respectively a general rule and illustrations, but rather contain two separate and cumulative definitions, applicable to different circumstances: *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 382, [1939] 2 All ER 723 at 727, HL, per Lord Wright. The Marine Insurance Act 1906 s 60(2) gives an objective criterion which is not only more precise but is substantially different from that in s 60(1): *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50 at 84, [1941] 3 All ER 62 at 79, HL, per Lord Wright. Thus, although the Marine Insurance Act 1906 s 60(1) states that there is a constructive total loss where the subject matter is reasonably abandoned (in the sense of given up for lost), constructive total loss is not limited to cases where there has been such abandonment: *Robertson v Petros M Nomikos Ltd* supra at 392 and 734 per Lord Porter; and see also *Irvin v Hine* supra at 568 and 1091 per Devlin J.

6 Before the Marine Insurance Act 1906, it was enough to show that recovery was uncertain: *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922, CA; *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50 at 86-87, [1941] 3 All ER 62 at 81, HL, per Lord Wright; *Wilson Bros Bobbin Co Ltd v Green* [1917] 1 KB 860; *Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd* [1941] 3 All ER 256. The likelihood of recovery must be judged in the light of the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment: *Richards v Forestal Land, Timber and Rlys Co Ltd* supra at 110-111 and 97 per Lord Porter. The former rule of law that a frustration of the venture by an insured peril gives rise to a constructive total loss under a voyage policy on goods, although the goods themselves are not damaged, has not been altered: *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, HL; *Richards v Forestal Land, Timber and Rlys Co Ltd* supra.

7 Marine Insurance Act 1906 s 60(2)(i). If the ship is obviously not worth repairing, the assured need not have a detailed examination made in order to estimate the cost of repair: see *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089 (abandonment without sale). The commercial irreparability must, however, be proved affirmatively; 'it must not be a mere measuring cost': see *Somes v Sugrue* (1830) 4 C & P 276 per Tindal CJ.

8 In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired: Marine Insurance Act 1906 s 60(2)(ii). As to general average contribution see PARA 420 et seq ante.

9 Ibid s 60(2)(ii).

10 Ibid s 60(2)(iii); see *Boon and Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd* [1975] 1 Lloyd's Rep 452, Malaysia HC (no proof by assured that cost of reconditioning and forwarding steel pipes would exceed their value on arrival).

11 See text and notes 1-3 supra.

12 *Polurrian Steamship Co Ltd v Young* (1913) 19 Com Cas 143 at 155 per Pickford J; *Roura and Forgas v Townend* [1919] 1 KB 189; *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 383, [1939] 2 All ER 723 at 728, HL, per Lord Wright; *Irvin v Hine* [1950] 1 KB 555 at 568-569, [1949] 2 All ER 1089 at 1091-1092 per Devlin J (difficulty of obtaining licence to repair); *Panamanian Oriental Steamship Corp v Wright* [1970] 2 Lloyd's Rep 365 (vessel seized by customs authorities and confiscated by military court; attempts were made to obtain her release; held to be a constructive total loss because her recovery was unlikely) (revsd on other grounds [1971] 2 All ER 1028, [1971] 1 WLR 882, CA); *The Bamburi* [1982] 1 Lloyd's Rep 312 (vessel detained by Iraqi authorities in war between Iraq and Iran, and forbidden to leave; held to be a constructive total loss because

her recovery was unlikely); see also *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 454, HL (a frustration case), where Lord Sumner said that rights ought not to be left in suspense or to hang on the chances of subsequent events, and that what happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted.

13 See *Goss v Withers* (1758) 2 Burr 683; *Ruys v Royal Exchange Assurance Corp*n [1897] 2 QB 135.

14 See *Moss v Smith* (1850) 9 CB 94 at 103. As to frustration of the venture as a further ground on which a claim for constructive total loss may be founded see PARA 458 note 5 ante.

15 As to the meaning of 'free use and disposal' see *The Bamburi* [1982] 1 Lloyd's Rep 312.

16 See the Institute War and Strikes Clauses (Hulls--Time) cl 3; Institute War and Strikes Clauses (Hulls--Voyage) cl 3. As to the Institute Clauses generally see PARA 330 ante.

UPDATE

468 Meaning of 'constructive total loss'

NOTE 3--See *Masefield AG v Amlin* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 (no abandonment of vessel seized by pirates occurred as ship-owners showed every intention of recovering property).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/A. MEANING/469. Notice of abandonment.

469. Notice of abandonment.

In all cases of constructive total loss, in order to recover for a total loss the assured must give notice of abandonment unless, at the time the assured hears of the loss, the insurer could derive no benefit from notice being given or unless the insurer waives notice of abandonment¹.

¹ Marine Insurance Act 1906 s 62(1), (7), (8); *Hamilton v Mendes* (1761) 2 Burr 1198 at 1212; and see PARA 465 ante. Notice of abandonment is not an essential ingredient of a constructive total loss, but the right to claim for such a loss generally depends on due notice having been given: *Robertson v Petros M Nomikos Ltd* [1939] AC 371, [1939] 2 All ER 723, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/A. MEANING/470. Distinction between insurances on ship and on goods.

470. Distinction between insurances on ship and on goods.

There is an essential distinction between an insurance on ship and an insurance on goods. An insurance on ship is a contract of indemnity against damage to, or destruction or loss of, the vessel, but not against the ship being prevented by perils insured against¹ from arriving at her point of destination; whereas an insurance on goods is a contract of indemnity not only against damage, but also against the goods being prevented by perils of the seas² from being carried to a port of destination. In other words, a loss of the insured voyage by reason of damage to the ship does not constitute a total loss of the ship³.

1 As to perils insured against see generally para 330 ante.

2 For the meaning of 'perils of the seas' see PARA 332 ante.

3 *Pole v Fitzgerald* (1752) Willes 650n (affd (1754) 4 Bro Parl Cas 439, HL); *Parsons v Scott* (1810) 2 Taunt 363; *Falkner v Ritchie* (1814) 2 M & S 290; *Brown v Smith* (1813) 1 Dow 349, HL; *Doyle v Dallas* (1831) 1 Mood & R 48 at 55; *Naylor v Taylor* (1829) Dan & LI 240 at 254.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/B. CONSTRUCTIVE TOTAL LOSS OF SHIP/471. Ascertainment of cost of repairs.

B. CONSTRUCTIVE TOTAL LOSS OF SHIP

471. Ascertainment of cost of repairs.

As regards the cost of repairs in the case of damage to ship, it is clear that in ascertaining whether there is a constructive total loss¹, no deduction is to be made of one-third new for old².

Moreover, if in order to repair the ship it is necessary to incur expenses for the purpose of obtaining possession from salvors or for the purpose of getting her off the rocks or for similar purposes, these must be taken into account either as cost of repairs, or more probably as being necessary for the preservation or recovery of the ship³. Similarly, if temporary repairs are to be effected at a port of refuge in order to enable the ship to be completely repaired at another port, both the temporary and the permanent repairs must be taken into account⁴.

1 For the meaning of 'constructive total loss' see PARA 468 ante.

2 *Henderson Bros v Shankland & Co* [1896] 1 QB 525, CA. Cf the Marine Insurance Act 1906 s 60(2)(ii); and PARA 468 ante. As to the deduction 'one-third new for old' see PARA 449 ante.

3 See *ibid* s 60(1), (2)(i), (ii); and PARA 468 ante.

4 See Arnould on Marine Insurance (16th Edn) s 1208.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/B. CONSTRUCTIVE TOTAL LOSS OF SHIP/472. Repairs necessary to make good damage.

472. Repairs necessary to make good damage.

It seems that some of the dicta in the earlier cases to the effect that there must be taken into account the cost of such repairs only as are necessary to enable the ship to sail in ballast to the port of destination, or to be navigable for any trade whatever, can no longer be considered good law¹, and that all the repairs must be estimated which are necessary to make good the damage caused by the perils insured against².

1 See especially the Marine Insurance Act 1906 s 60(2)(i), (ii); and PARA 468 ante.

2 The dicta referred to are to be found in *Doyle v Dallas* (1831) 1 Mood & R 48, and other cases. On the other hand see the direction of Erle CJ in *Phillips v Nairne* (1847) 4 CB 343, and the direction of Kennedy J in *North Atlantic Steamship Co v Burr* (1904) 9 Com Cas 164; and in *Agenoria Steamship Co v Merchants Marine Insurance Co* (1903) 8 Com Cas 212. If the repair of the damage caused by a peril of the seas makes it necessary also to repair the decayed parts of the vessel, no deduction is to be made from the cost of the former repairs on the ground that the decayed parts are also made good: *Phillips v Nairne* supra, where the judgment in the Louisiana case of *Hyde v Louisiana State Insurance Co* 2 Mar NS 410 (1824), was approved. In *Carras v London and Scottish Insurance Corp Ltd* (1935) 52 Ll L Rep 34 (revsd on other grounds [1936] 1 KB 291, CA), a vessel stranded in the Magellan Straits on her way to load at Valparaiso under a charterparty. It would have been cheaper to repair her in Europe than South America. Porter J held: (1) that the cost of repairs must be estimated on the footing that the vessel would be repaired in Europe; (2) that the expense of taking the vessel to Europe and bringing her back to South America (including crew's wages and victualling and voyage insurance) could be added to the cost of repairs for the purpose of ascertaining whether she was a constructive total loss; (3) that the fees of surveyors advising what repairs would be necessary might be taken into account; (4) that the wages and maintenance of the crew during repairs and the cost of insuring the vessel during repairs must be excluded.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/B. CONSTRUCTIVE TOTAL LOSS OF SHIP/473. Value of wreck in determining total loss.

473. Value of wreck in determining total loss.

In determining whether damage to a vessel gives rise to a claim for a constructive total loss¹, the value of the vessel in her damaged condition cannot be added to the cost of repairs unless the policy expressly authorises this addition².

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, for those contributions, like contributions from tortfeasors, do not directly affect the amount of actual damage³.

1 For the meaning of 'constructive total loss' see PARA 468 ante.

2 See *Hall v Hayman* [1912] 2 KB 5, where Bray J, applying the canon of construction appropriate to a codifying Act (see PARA 15 ante), held that the Marine Insurance Act 1906 s 60(2)(ii) (see PARA 468 ante), had altered the law as laid down in *Macbeth & Co Ltd v Maritime Insurance Co Ltd* [1908] AC 144, HL. By this latter decision which, although given after the passing of the 1906 Act, was based on the previous law as the loss occurred before the passing of the Act, the House of Lords overruled *Angel v Merchants Marine Insurance Co* [1903] 1 KB 811, CA. In *Carras v London and Scottish Assurance Corp'n Ltd* [1936] 1 KB 291 at 305 and 311, CA, respectively, Lord Wright MR and Slesser LJ suggested that the rule laid down by the 1906 Act applies only to policies on hull, and that the test established by *Macbeth & Co Ltd v Maritime Insurance Co Ltd* supra, is still to be applied when, in the case of freight policies, it is necessary to decide whether as between shipowner and charterer the prudent owner would sell or repair. The Institute Time Clauses (Hulls) cl 19.1, and the Institute Voyage Clauses (Hulls) cl 17.1 (incorporated respectively by the Institute War and Strikes Clauses (Hulls--Time) cl 2, and the Institute War and Strikes Clauses (Hulls--Voyage) cl 2), provide that nothing in respect of the damaged or break-up value of the vessel or wreck may be taken into account. As to the Institute Clauses generally see PARA 330 ante.

3 Marine Insurance Act 1906 s 60(2)(ii): see PARA 468 et seq ante. On the other hand, account is to be taken of the expense of future salvage operations and any future general average contributions to which the ship would be liable if repaired: s 60(2)(ii). In *Kemp v Halliday* (1866) LR 1 QB 520, Ex Ch, it was decided that when the ship and cargo were salvaged by the same operation, general average contributions due from the cargo must be deducted in estimating the cost of salvaging and repairing the ship. It is submitted that this decision should still be regarded as good law: see PARA 15 text and note 5 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/B. CONSTRUCTIVE TOTAL LOSS OF SHIP/474. Relevance of insured value.

474. Relevance of insured value.

As to the value of the ship, unless the policy contains some express provision to the contrary, no regard is to be had to the sum at which the ship may be valued in the policy. Thus, if the cost of repairs would be £1,900,000 and the ship's market value when repaired would only be £1,050,000, there could be a constructive total loss although the ship may be valued in the policy at £3,000,000¹.

¹ See the Marine Insurance Act 1906 s 27(4); *Young v Turing* (1841) 2 Man & G 593; *Irving v Manning* (1847) 1 HL Cas 287. The Institute Time Clauses (Hulls) cl 19.1, and the Institute Voyage Clauses (Hulls) cl 17.1 (incorporated respectively by the Institute War and Strikes Clauses (Hulls--Time) cl 2, and the Institute War and Strikes Clauses (Hulls--Voyage) cl 2), provide that the insured value is to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss. The policies of some insurance clubs have a clause barring claims for constructive total loss unless the estimated cost of the repairs is equal to 80% of the value declared on the policy, although the cost of repairs may be greater than the value of the ship when repaired. See *Forwood v North Wales Mutual Marine Insurance Co* (1880) 9 QBD 732, CA; *North Atlantic Steamship Co v Burr* (1904) 9 Com Cas 164; *Irvin v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089. As to the effect of the inclusion of the Institute Clause in a freight policy see *Carras v London and Scottish Insurance Corp Ltd* [1936] 1 KB 291, CA; and PARAS 466-467 ante. As to the Institute Clauses generally see PARA 330 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/B. CONSTRUCTIVE TOTAL LOSS OF SHIP/475. Peculiar and exceptional vessels.

475. Peculiar and exceptional vessels.

In general, the value of the ship with which the cost of the repairs is to be compared is her market price, but in the case of a peculiar and exceptional vessel built for her owners with a view to a particular trade the market price would not afford a true measure of her value and it is therefore necessary to ascertain what value the repaired vessel would be to her owners¹. The market value of a vessel depends upon her general capacity to earn freight, but it is undecided whether in estimating her repaired value for the purpose of a constructive total loss, the fact that she was at the time of the loss under a peculiarly profitable charter should be taken into account².

1 See the judgment of Wood V-C in *African Steamship Co v Swanzy and Kennedy* (1856) 2 K & J 660 at 664; *The Iron-Master* (1859) Sw 441; *The Harmonides* [1903] P 1; *Grainger v Martin* (1862) 2 B & S 456 (affd (1863) 4 B & S 9, Ex Ch).

2 See Arnould on Marine Insurance (16th Edn) s 1214, where it is suggested that the value should be considered enhanced by 'beneficial engagements', but that, in view of the standard Institute Clauses, the point is of little significance.

Account is, however, to be taken of the expense of future salvage operations, and any future general average contributions to which the ship would be liable if repaired: Marine Insurance Act 1906 s 60(2)(ii); and see PARA 468 note 8 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/C. CONSTRUCTIVE TOTAL LOSS OF GOODS/476. Damaged goods.

C. CONSTRUCTIVE TOTAL LOSS OF GOODS

476. Damaged goods.

If it is practicable to carry to the port of destination in a marketable state any part of the insured cargo, there is no constructive total loss of goods¹. On the other hand, any expenses which have to be incurred to enable the goods to be so carried must be taken into account², for instance, not only the cost of unshipping the cargo, drying, warehousing and reshipping, but also the amount of the salvage which may have to be paid in respect of the cargo salvaged³.

1 *Rosetto v Gurney* (1851) 11 CB 176 at 186, 190. As to what constitutes a constructive total loss of goods see the Marine Insurance Act 1906 s 60(2)(i), (iii); and PARA 468 ante. The frustration of the insured adventure by a peril insured against will constitute a constructive total loss under a voyage policy on goods: see PARA 458 note 5 ante. If a sale of the cargo is not otherwise justifiable, it will not be rendered so by being made under a decree of a vice-admiralty court or any other similar court abroad: *Reid v Darby* (1808) 10 East 143; *The Segredo (otherwise The Eliza Cornish)* (1853) 1 Ecc & Ad 36 per Dr Lushington. As to the de minimis rule see PARA 462 note 1 ante.

2 Marine Insurance Act 1906 s 60(1), (2)(iii): see PARA 468 ante.

3 Where, however, the master hypothecates the ship and cargo to pay expenses for repairing the ship, the debt and costs paid to the holder of the bottomry bond are not to be taken into consideration in estimating the extent, whether total or partial, of the loss, inasmuch as the insurer does not insure in respect of a loss by hypothecation: *Rosetto v Gurney* (1851) 11 CB 176.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/C. CONSTRUCTIVE TOTAL LOSS OF GOODS/477. Whether freight may be taken into account.

477. Whether freight may be taken into account.

As regards the cost of sending on the cargo or any part of it, it was decided, before the passing of the Marine Insurance Act 1906, that it was only the increased cost of sending it on at a rate of freight higher than the original rate which could be taken into consideration¹. The correctness of this decision was, however, impugned by eminent average adjusters, who strongly contended that the whole of the original freight, or, if the goods had to be forwarded by another ship, the whole of the freight paid to the latter ship, must be taken into consideration².

Considering the doubts entertained as to the decision referred to above, and the explicit language of the Act³, it is submitted that the Act has the effect of overruling that decision; in other words that, according to the principle of construction applicable to a codifying statute⁴, the 'cost of forwarding the goods' to their destination cannot be held to mean merely the excess, if any, of the substituted freight over the original freight⁵.

¹ See the two leading cases, *Rosetto v Gurney* (1851) 11 CB 176; and *Farnworth v Hyde* (1866) LR 2 CP 204, Ex Ch.

² In Arnould on Marine Insurance (16th Edn) ss 1224-1231, the arguments on both sides are fully discussed, but the only question now material is whether the Marine Insurance Act 1906 s 60(2)(iii) has abrogated the rule of law which must undoubtedly be taken to have existed before the statute came into force.

³ See *ibid* s 60(2)(iii); and PARA 468 ante.

⁴ See PARA 15 ante.

⁵ See also Arnould on Marine Insurance (16th Edn) s 1231.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/D. RIGHTS OF ASSURED: NOTICE OF ABANDONMENT/478. Right of election.

D. RIGHTS OF ASSURED: NOTICE OF ABANDONMENT

478. Right of election.

Where there is a constructive total loss¹ the assured may either treat the loss as a partial loss or abandon the subject matter insured to the insurer and treat the loss as if it were an actual total loss².

Where the assured elects to abandon the subject matter insured to the insurer, he must (except in certain special cases) give notice of abandonment; if he fails to do so, the loss can only be treated as a partial loss³.

If the assured elects to treat the loss as a partial loss⁴, or if he fails to give due notice of abandonment, he cannot recover for a total loss in respect of the same casualty⁵, unless in the event the loss becomes actually total by the operation of that casualty⁶. He is not, however, prevented from recovering for a total loss in respect of a subsequent casualty. For instance, if the insured ship is captured and the assured does not give due notice of abandonment, and the ship is afterwards recaptured and then lost by perils of the seas, the assured is not prevented from recovering for a total loss in respect of the second casualty⁷. Moreover, it seems that there may be cases where a mere prolongation of time during which the assured is deprived of his property may have the effect of reviving the right of abandonment on giving due notice of it⁸.

1 For the meaning of 'constructive total loss' see PARA 468 ante.

2 Marine Insurance Act 1906 s 61. The right to abandon is a superimposed right of election where there is a constructive total loss, and is not an essential ingredient of such a loss: see *Robertson v Petros M Nomikos Ltd* [1939] AC 371 at 382, [1939] 2 All ER 723 at 727, HL, per Lord Wright.

3 Marine Insurance Act 1906 s 62(1); and see *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376 at 383 per Bigham J. The exceptions are set out in the Marine Insurance Act 1906 s 62(7), (8), (9): see PARAS 469 ante, 483 post.

4 See *Aitchison v Lohre* (1879) 4 App Cas 755, HL; *Pitman v Universal Marine Insurance Co* (1882) 9 QBD 192 at 208, CA, per Brett LJ; *Mellish v Andrews* (1812) 15 East 13 at 16 per Lord Ellenborough CJ.

5 *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38.

6 *Mellish v Andrews* (1812) 15 East 13; *Stringer v English and Scottish Marine Insurance Co* (1870) LR 5 QB 599, Ex Ch. These cases were distinguished in *Fooks v Smith* [1924] 2 KB 508, where the voyage was frustrated by restraint of princes and the goods were landed, but the assured failed to give notice of abandonment. More than a year later, and after the expiration of the policy, they were requisitioned. The assured sought to recover on the ground that the original restraint of princes had resulted in the requisitioning and so produced an actual total loss. It was held, however, that they were not entitled to recover on the ground that the requisitioning was not the necessary or natural or direct consequence of the original restraint. As to actual total loss see PARA 458 ante.

7 Cf *Mellish v Andrews* (1812) 15 East 13.

8 2 Phillips' Law of Insurance (5th Edn) ss 1669, 1672, 1674; cf *Stringer v English and Scottish Marine Insurance Co* (1870) LR 5 QB 599, Ex Ch.

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479. Insurance against total loss includes constructive loss.

Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss¹; and where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss².

1 Marine Insurance Act 1906 s 56(3).

2 Ibid s 56(4).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/D. RIGHTS OF ASSURED: NOTICE OF ABANDONMENT/480. Form of notice of abandonment.

480. Form of notice of abandonment.

Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject matter insured unconditionally to the insurer¹.

In order that the abandonment to the insurer may be valid, it must be unconditional, and must also extend, unless the contract of insurance is severable, to the whole of the assured's interest in the property at risk at the time of the disaster so far as that interest is covered by the policy. The policy may, however, be so framed as to comprise several insurances: for instance £100,000 may be insured on sugar and £500,000 on wheat in the same policy, or the sugar may be valued in the policy at £100,000 and the wheat at £500,000; in such cases each interest may be separately abandoned².

1 Marine Insurance Act 1906 s 62(2). See *Currie & Co v Bombay Native Insurance Co* (1869) LR 3 PC 72, disapproving the judgment of Lord Ellenborough CJ in *Parmeter v Todhunter* (1808) 1 Camp 541; and see *Theelluson v Fletcher* (1793) 1 Esp 73; *King v Walker* (1864) 3 H & C 209, Ex Ch; *Russian Bank for Foreign Trade v Excess Insurance Co Ltd* [1919] 1 KB 39, CA; *G Cohen, Sons & Co v Standard Marine Insurance Co Ltd* (1925) 30 Com Cas 139 at 157. The question, however, will always be whether the conditions of the Marine Insurance Act 1906 s 62(2) are fulfilled in any particular case, and this is a question of construction in which decided cases are of little assistance.

2 Marshall on Marine Insurance (4th Edn) 486. Where a vessel is insured with different insurers, each insurer who accepts the notice of abandonment acquires all interest in the subject matter insured or in its proceeds in the proportion which the amount subscribed by him bears to the full value; and the assured retains a like interest so far as he is not fully insured: see the Marine Insurance Act 1906 s 81; and PARA 440 ante. See also *The Commonwealth* [1907] P 216, CA; *Whitworth Bros v Shepherd* (1884) 12 R 204, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iii) Constructive Total Loss/D. RIGHTS OF ASSURED: NOTICE OF ABANDONMENT/481. Time when notice of abandonment must be given.

481. Time when notice of abandonment must be given.

Notice of abandonment must be given with reasonable diligence¹ after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry².

If the assured receives information of a loss, such as capture or arrest, which is prima facie a constructive total loss³, he must give notice of abandonment immediately on receipt of the information⁴. However, if the information is in itself doubtful, or if it leaves uncertain the question whether the loss or damage constitutes a prima facie constructive total loss, he may wait in order to verify the information or to ascertain the real extent of the loss⁵.

The cause of action arises on the date of the casualty and not on the date of the giving of the notice of abandonment⁶.

1 The question of what is reasonable diligence is a question of fact: Marine Insurance Act 1906 s 88. The ability to claim for a constructive total loss is not lost as a result of the inability of the assured to serve notice of abandonment before the vessel had become an actual total loss in consequence of another peril: *Kastor Navigation Co Ltd v AGF MAT, The Kastor Too* [2002] EWHC 2601 (Comm), [2002] All ER (Comm) 277, [2003] 1 Lloyd's Rep 296.

2 Marine Insurance Act 1906 s 62(3).

3 As to constructive total loss see PARA 468 ante.

4 *Hunt v Royal Exchange Assurance* (1816) 5 M & S 47; *Kaltenbach v Mackenzie* (1878) 3 CPD 467 at 480, CA; *Allwood v Henckell* (1795) 1 Park's Marine Insurances (8th Edn) 399; *Aldridge v Bell* (1816) 1 Stark 498; *Mullett v Shedden* (1811) 13 East 304; *Mellish v Andrews* (1812) 15 East 13; and see *Currie & Co v Bombay Native Insurance Co* (1869) LR 3 PC 72 at 79; *Hudson v Harrison* (1821) 3 Brod & Bing 97 at 106.

5 *Gernon v Royal Exchange Assurance* (1815) 6 Taunt 383 at 387.

6 *Bank of America National Trust and Savings Association v Christmas, The Kyriaki* [1993] 1 Lloyd's Rep 137.

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482. Loss of right to give notice.

If, after receiving notice of a casualty which may give rise to a constructive total loss, the assured prosecutes the adventure, he cannot afterwards, when he has ascertained that the damage would have entitled him to treat the loss as a constructive total loss, give notice of abandonment; thus, where the owners of a ship which was damaged in a foreign port have elected to treat the loss as partial, they cannot afterwards turn it into a total loss by giving notice of abandonment merely because they find on the ship's arrival that she is not worth repairing¹. Similarly, if, on receiving information that a casualty has occurred which amounts to a constructive total loss, the assured orders the subject matter insured to be sold, he cannot afterwards by virtue of giving notice of abandonment recover as for a total loss².

The assured may even lose his right to treat a loss as a constructive total loss through the master's unjustifiable delay in ascertaining whether or not the loss is total, the assured being thereby precluded from giving notice of abandonment to the insurer within a reasonable time³.

¹ *Fleming v Smith* (1848) 1 HL Cas 513; *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38; *Barker v Blakes* (1808) 9 East 283.

² *Kaltenbach v Mackenzie* (1878) 3 CPD 467.

³ *Potter v Campbell* (1867) 16 WR 399; also referred to in *Rankin v Potter* (1873) LR 6 HL 83 at 117, 119, 123.

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483. Acceptance of notice of abandonment.

The acceptance of a notice of abandonment may be either express or implied from the conduct of the insurer; his mere silence after notice is not an acceptance¹. However, after receiving notice of abandonment he has no right, by salving the subject matter insured, to claim that he has reduced the total loss to a partial loss². On the contrary, if, after receiving the notice, he does any act which would only be justified under a right derived from it, he will be estopped from denying that he has accepted the notice³. Moreover, where no notice of abandonment has been given, such conduct on his part may preclude him from denying that he has waived his right to the notice⁴.

1 Marine Insurance Act 1906 s 62(5); *Smith v Robertson* (1814) 2 Dow 474, HL; *Hudson v Harrison* (1821) 3 Brod & Bing 97; *Thelluson v Fletcher* (1793) 1 Esp 73.

2 *Blairmore Co Ltd (Sailing Ship) v Macredie* [1898] AC 593, HL.

3 *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224; *Shepherd v Henderson* (1881) 7 App Cas 49, HL; and see ESTOPPEL. It should, however, be noted that the Marine Insurance Act 1906 s 62(5) makes no mention of estoppel, but provides that the acceptance may be either express or implied from the insurer's conduct, and it is submitted that this acceptance may be implied in some cases in which the assured may not have changed his position in reliance on the conduct in question, and, indeed, may have been ignorant of it, so that no estoppel, strictly so called, could arise. Contrast *Robertson v Royal Exchange Assurance Corp* 1925 SC 1, with *Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co* [1927] AC 698 at 701, PC.

4 See the Marine Insurance Act 1906 s 62(8); and the cases cited in note 3 supra.

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484. Effect of acceptance and non-acceptance of notice of abandonment.

Where notice of abandonment is accepted, the abandonment is irrevocable; the acceptance conclusively admits liability for the loss and the sufficiency of the notice¹. However, notice of abandonment given or accepted under a mutual mistake of fact may be a nullity².

If the notice of abandonment is not accepted, it is defeasible either by the subsequent restoration of the insured property or by acts showing that the assured has treated the loss as partial and not total³, but where the notice has been properly given the assured's rights are not prejudiced by the fact that the insurer refuses to accept the abandonment⁴.

1 Marine Insurance Act 1906 s 62(6); *Smith v Robertson* (1814) 2 Dow 474, HL.

2 *Norwich Union Fire Insurance Society Ltd v Price Ltd* [1934] AC 455 at 466-467, PC.

3 This passage, in an earlier edition of this work, was approved by Atkinson J in *Pesquerias y Secaderos de Bacalao de España SA v Beer* (1946) 79 Ll L Rep 417 at 433 (revsd on the facts (1947) 80 Ll L Rep 318, CA; (1949) 82 Ll L Rep 501, HL). As to the restoration of insured property, however, see PARA 489 post.

4 Marine Insurance Act 1906 s 62(4). It is probable that where notice of abandonment is given but not accepted, the property does not thereby become res nullius: *Blane Steamships Ltd v Minister of Transport* [1951] 2 KB 965 at 990-991, CA, per Cohen LJ, approving *Oceanic Steam Navigation Co Ltd v Evans* (1934) 50 Ll L Rep 1 at 3, CA, per Greer LJ, and doubting the view expressed by Bailhache J in *Boston Corpn v France, Fenwick & Co Ltd* (1923) 28 Com Cas 367.

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485. Master's capacity before and after notice.

In general, after notice of abandonment has been given the master acts for the benefit of all concerned in dealing with the subject matter insured; however, where it clearly appears that he has been acting under the directions or for the benefit of the assured exclusively and not for the benefit of the insurers, the assured may thereby forfeit his right to insist on the notice of abandonment, or be deemed to have impliedly withdrawn it¹. It must, however, be borne in mind that under the suing and labouring clause², notwithstanding the notice of abandonment, the master is authorised to take all necessary steps for the safeguard and preservation of the subject matter of the insurance, and further that he may in case of necessity sell the property and thereby turn the constructive into an actual total loss³.

Until notice of abandonment has been given, prima facie the master acts as the assured's agent. Thus, if a captured ship is repurchased by the master in cases where no notice of abandonment is given, he acts as agent for the owner, and if he does so within the scope of his authority, the assured will be precluded from recovering for a total loss⁴.

1 *Fleming v Smith* (1848) 1 HL Cas 513; cf *Shepherd v Henderson* (1881) 7 App Cas 49, HL.

2 As to the suing and labouring clause see PARA 435 ante.

3 As to the conversion of a constructive into an actual total loss see PARA 465 ante; and see *Brown v Smith* (1813) 1 Dow 349, HL; *Allan v Sugrue* (1828) Dan & LI 188 at 190 note (a); *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159. The suing and labouring clause is now referred to in the Institute Clauses as the 'duty of assured' clause. In relation to cargo, the waiver clause immediately follows it; in relation to hulls, the waiver clause is incorporated in the duty of assured clause. The Institute Clauses provide that no act of the insurer or the assured in recovering, saving or preserving the property insured is to be considered as a waiver or acceptance of abandonment. See the Institute Cargo Clauses (A) cl 17; the Institute Cargo Clauses (B) cl 17; the Institute Cargo Clauses (C) cl 17; the Institute War Clauses (Cargo) cl 12; the Institute Strikes Clauses (Cargo) cl 12; the Institute Time Clauses (Hulls) cl 11.3; the Institute Voyage Clauses (Hulls) cl 9.3; the Institute War and Strikes Clauses (Hulls--Time) cl 2; the Institute War and Strikes Clauses (Hulls--Voyage) cl 2. See generally para 330 ante.

This clause will not prevent the insurers from being deemed to have accepted the notice of abandonment if they conduct salvage operations in a manner prejudicial to the property insured with a view to salvaging other property in which they are interested: *Robertson v Royal Exchange Assurance Corp* 1925 SC 1.

4 *M'Masters v Shoolbred* (1794) 1 Esp 236; *Wilson v Forster* (1815) 6 Taunt 25.

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E. EFFECT OF VALID ABANDONMENT

486. Effect of valid abandonment.

Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter insured, and all proprietary rights incidental to it¹.

On the abandonment of a ship, the insurer is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss².

If the insured ship is abandoned during the voyage, but nevertheless succeeds in completing it so far as to earn freight, that freight does not belong to the shipowner or to the insurer on freight, but, after deducting the expenses of earning it incurred after the casualty, belongs to the insurer on ship³. The insurer on ship, however, is entitled only to the net freight earned by the insured ship, and not to that which may be earned by a subsequent ship⁴. Nor is he entitled to receive freight paid in advance by a charterer, inasmuch as the shipowner is entitled to that freight whether the voyage is subsequently completed or not. Similarly, he is not entitled to the excess of the bill of lading freight over the chartered freight, inasmuch as that excess belongs to the charterer and not to the shipowner; moreover, from the charterparty freight receivable by the insurers there must be deducted the freight's proportion of general average and particular charges, but not expenses incurred in respect of freight earned on the voyage prior to the abandonment⁵.

1 Marine Insurance Act 1906 s 63(1).

2 Ibid s 63(2). The insurer of a ship is not entitled under this clause to freight for the carriage of the goods to the place of the casualty: *Miller v Woodfall* (1857) 8 E & B 493; see note 3 infra.

3 *Case v Davidson* (1816) 5 M & S 79 (affd sub nom *Davidson v Case* (1820) 2 Brod & Bing 379, Ex Ch); *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159; *Sea Insurance Co v Hadden* (1884) 13 QBD 706 at 711, CA; *The Red Sea* [1896] P 20 at 24, CA. Insurers on freight may, however, be entitled to receive from the shipowner pro rata freight paid to him for carriage of the goods to the place of the casualty: *London Assurance Corp'n v Williams* (1892) 9 TLR 96 (affd with comment (1893) 9 TLR 257, CA).

4 *Hickie v Rodocanachi* (1859) 28 LJEx 273.

5 *The Red Sea* [1896] P 20, CA.

UPDATE

486 Effect of valid abandonment

NOTE 1--See *Dornoch Ltd v Westminster International BV* [2009] EWHC 889 (Admlty), [2009] 2 All ER (Comm) 399.

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487. Effect of valid notice on liabilities of assured.

Once a valid notice of abandonment has been given and accepted, the assured ceases to be owner and is released from all liability attaching to ownership which may have accrued since the loss¹. On the other hand, if, on abandonment to him, the insurer takes over the interest of the assured in the insured ship, he must bear all the liabilities to which the owner would have been subject except such as accrued before the casualty took place and did not arise from perils insured against².

From the language of the Marine Insurance Act 1906³ it may be argued that, although there is a valid notice of abandonment, unless the insurer at any rate actually accepts the notice, he is not bound to take over the abandoned property and may refuse to do so and thereby free himself from all such liability; but the point has not yet been decided and is one of doubt and difficulty⁴.

1 *Barraclough v Brown* (1896) 65 LJQB 333, CA (affd [1897] AC 615, HL); *Arrow Shipping Co v Tyne Improvement Comrs, The Crystal* [1894] AC 508, HL, followed in *Boston Corp'n v France, Fenwick & Co Ltd* (1923) 28 Com Cas 367.

2 *Sharp v Gladstone* (1805) 7 East 24; *Barclay v Stirling* (1816) 5 M & S 6; *Sea Insurance Co v Hadden* (1884) 13 QBD 706, CA. As to whether the insurer on goods to whom they are duly abandoned takes them subject to the shipowner's claim for freight see *Baillie v Moudigliani* (1785) 1 Park's Marine Insurances (8th Edn) 116, and *Mason v Marine Insurance Co* 110 Fed R 452 (1901), Circuit CA, and compare them with 2 Phillips' Law of Insurance (5th Edn) s 1718.

3 See the Marine Insurance Act 1906 s 63(1); and PARA 486 ante.

4 See *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159 at 183 per Lord Cottenham; and 2 Phillips' Law of Insurance (5th Edn), ss 1726-1727. In *Boston Corp'n v France, Fenwick & Co Ltd* (1923) 28 Com Cas 367, Bailhache J thought that there was 'a good deal to be said' for the view that in such circumstances the wreck becomes res nullius. See, however, *Oceanic Steam Navigation Co v Evans* (1934) 50 Ll L Rep 1 at 3, CA, per Greer LJ, and *Blane Steamships Ltd v Minister of Transport* [1951] 2 KB 965 at 990-991, CA, per Cohen LJ, where a contrary view is expressed. See further Arnould on Marine Insurance (16th Edn) s 1290.

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488. Apportionment of salvage on abandonment.

On abandonment, if the assured is fully insured, each of the insurers is entitled to share in the proceeds of the salvage according to the proportion which the amount underwritten by him bears to the whole value of the thing insured, without regard to the date of the different subscriptions or the priority of the policies if more than one. Moreover, if the assured is not fully insured he is entitled to share in those proceeds in the proportion to which he is uninsured¹.

¹ See *The Commonwealth* [1907] P 216, CA. See also *Duus, Brown & Co v Binning* (1906) 11 Com Cas 190. As to the salvage arising from a sum received from a tortfeasor, who caused the loss, see *The Welsh Girl* (1906) 22 TLR 475 (affd sub nom *The Commonwealth* supra), where the owners of the insured ship, being under-insured and therefore their own insurers to a certain amount, were held entitled to share proportionately the money recovered by them against the tortfeasor who had occasioned the loss. There may, of course, be liens on the salvage which take precedence over the insurer's right, such as, for instance, the jus ad rem acquired by the holder of a bottomry bond: *Stephen v Broomfield, The Great Pacific* (1869) LR 2 PC 516. As to the general result of the assured not being fully insured see PARA 440 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(12) TOTAL LOSS/(iv) Ademption of Total Loss/489. Ademption of total loss.

(iv) Ademption of Total Loss

489. Ademption of total loss.

At the time of the passing of the Marine Insurance Act 1906 it was a doctrine of English insurance law that, although a constructive total loss¹ had occurred and due notice of abandonment had been given, the assured could not recover for a total loss if, before the action was brought, the subject matter insured had been restored in such circumstances that he might reasonably be expected to take possession of it².

A total loss was said to have been adeemed if the loss did not continue to be total at the commencement of the action³. Thus, where the ship or goods had been captured, then, even though due notice of abandonment was given, if the property was released so that the assured might reasonably be expected to take possession of it, he could only recover for a partial loss⁴. On the other hand the mere release or restitution of the insured property would not have this effect if the assured might eventually have to pay more for it than it was worth, and therefore could not reasonably be expected to take possession of it⁵.

This doctrine appears to be peculiar to English law. In Scotland, on the Continent and in the United States of America, a constructive total loss followed by due notice of abandonment has been held definitely to fix the parties' rights, and the assured's right to recover for a total loss to be in no way affected by subsequent events⁶. Under the provisions of the Marine Insurance Act 1906 as to the effect of constructive total loss⁷, the assured's right in case of constructive total loss to abandon the subject matter insured and treat the loss as if it were an actual total loss is apparently unqualified, and although the Act enters with much detail into the law relating to constructive total loss and abandonment⁸, it contains no provision that a constructive total loss is adeemed by events which take place after due notice of abandonment. Although there have been dicta on the subject since the passing of the Act, the courts have not yet decided whether the Act was intended to assimilate the law of England to that of Scotland and other countries, so that a constructive total loss followed by due notice of abandonment would definitely fix the right of the assured to recover for a total loss⁹.

1 For the meaning of 'constructive total loss' see PARA 468 ante.

2 *Hamilton v Mendes* (1761) 2 Burr 1198; *Bainbridge v Neilson* (1808) 10 East 329; *Patterson v Ritchie* (1815) 4 M & S 393; *Brotherston v Barber* (1816) 5 M & S 418; *Naylor v Taylor* (1829) 9 B & C 718.

3 *Shepherd v Henderson* (1881) 7 App Cas 49, HL, per Lord Blackburn.

4 See the cases cited in note 2 supra.

5 *M'Iver v Henderson* (1816) 4 M & S 576; *Cologan v London Assurance Co* (1816) 5 M & S 447; *Holdsworth v Wise* (1828) 7 B & C 794; *Naylor v Taylor* (1829) 9 B & C 718; *Parry v Aberdeen* (1829) 9 B & C 411; *Lozano v Janson* (1859) 2 E & E 160; *Ruys v Royal Exchange Assurance Corp'n* [1897] 2 QB 135, where it was decided that the doctrine does not apply to a case where the restitution of the insured property has taken place after the commencement of proceedings and during the trial.

6 Lord Eldon LC expressed disapproval of the English doctrine in *Smith v Robertson* (1814) 2 Dow 474, HL; and Lord Halsbury LC in *Blairmore Co Ltd (Sailing Ship) v Macredie* [1898] AC 593, HL, suggested that it only applied to cases of capture and similar cases. As to the meaning of a clause to pay a total loss 30 days after official news of the embargo or capture, 'without waiting for condemnation' see *Fowler v English and Scottish Marine Insurance Co Ltd* (1865) 18 CBNS 818.

7 le the Marine Insurance Act 1906 s 61: see PARA 478 ante.

8 As to constructive total loss and abandonment see PARA 468 et seq ante.

9 In *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922, CA, the court, affirming the judgment of Pickford J, said 'Now it is indisputable that, according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date'. See also *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1942] AC 50 at 85, [1941] 3 All ER 62 at 81, HL, per Lord Wright; *Roura and Forgas v Townend* [1919] 1 KB 189 at 195 per Roche J; *Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co* [1927] AC 698 at 704, PC; *Marstrand Fishing Co Ltd v Beer* [1937] 1 All ER 158. Cf, however, the dicta of Atkinson J in *Pesquerias y Secoderos de Bacalao de España SA v Beer* (1946) 79 Ll L Rep 417 at 433 (revsd on other grounds (1947) 80 Ll L Rep 318, CA; [1949] 1 All ER 845n, HL). In order to avoid this prejudice to the assured, insurers usually agree to place the assured in the same position as if a writ had been issued on the day on which notice of abandonment was given: *Polurrian Steamship Co Ltd v Young* supra at 153 per Pickford J; *Panamanian Oriental Steamship Corp v Wright* [1970] 2 Lloyd's Rep 365 at 383 per Mocatta J; *The Bamburi* [1982] 1 Lloyd's Rep 312 at 321 per Staughton J. It is clear, however, that if the total loss is adeemed before proceedings are brought, the assured cannot recover for a total loss, but if such ademption results from the acts of the assured, his employees or agents, the assured is entitled, under the suing and labouring clause (as to which see PARA 435 ante), to be recouped the expenses incurred in saving the subject matter insured: *Kidston v Empire Marine Insurance Co* (1867) LR 2 CP 357, Ex Ch. If the expenses consist of maritime salvage charges or general average expenditure, they will be recoverable, not under the suing and labouring clause, but as a loss by perils insured against: see the Marine Insurance Act 1906 ss 65, 66(1), (4), 78(2); and PARAS 420, 426, 434 and 436 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(13) SUBROGATION/490. General principle of subrogation.

(13) SUBROGATION

490. General principle of subrogation.

Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over¹ the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss². Subject to these provisions, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all the rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified by that payment for the loss³.

Therefore, when a loss happens, anything which reduces or diminishes it reduces or diminishes the amount the insurer is bound to pay; and if the insurer has already paid the full loss, then if anything which diminishes the loss afterwards comes into the hands of the assured, the insurer is entitled to be recouped to the extent of the benefit so received⁴.

The principle of subrogation may be illustrated as follows: if two ships, A and B, come into collision and the collision is due to the negligence of those in charge of B, the owner of A, who has insured her, can recover the amount of his loss from the owner of B, and the owner of B cannot resist the claim on the ground that the owner of A was entitled to recover or had already recovered from his insurers. If the owner of A has recovered his loss from the owner of B he will be compelled to account to the insurers for the money he has so received, and his claim against them will be to that extent reduced or, if he has recovered a complete indemnity, extinguished⁵. The owner of A may, however, in the first instance recover his loss from the insurers, in which case they will be subrogated to his right to recover the loss from the owner of B⁶.

It is immaterial whether the premium is paid by the assured or some other party; thus where shipowners were obliged by a contract to pay the premium on the insurance on cargo, this did not affect the right of the insurers of the cargo to be subrogated to the rights of the cargo-owners in order to recover damages in an action against the shipowners⁷.

1 These same words appear in the Marine Insurance Act 1906 s 63(1) (see PARA 486 ante), and it would therefore seem that the insurer is not bound to take over the assured's interest in the subject matter insured, but has a choice whether or not to do so. See also PARA 487 ante.

2 Ibid s 79(1). Section 79 gives the insurer a contingent right of subrogation which attaches and vests at the moment when the policy is effected: *Boag v Standard Marine Insurance Co Ltd* [1937] 2 KB 113 at 122, [1937] 1 All ER 714 at 719, CA, per Lord Wright MR. See also *Simpson v Thomson* (1877) 3 App Cas 279 at 284, HL; and EQUITY; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138. There can be no right of subrogation under a ppi policy, for such a policy is void: *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249. The fact that the assured has claimed and received payment under such a policy is immaterial: *John Edwards & Co v Motor Union Insurance Co Ltd* supra. As to ppi policies see PARA 386 ante.

3 Marine Insurance Act 1906 s 79(2). An insurer cannot be subrogated to the assured's rights where he has not paid the assured: *Scottish Union and National Insurance Co v Davis* [1970] 1 Lloyd's Rep 1, CA.

4 See *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333 at 339, HL, per Lord Blackburn; see also *Darrell v Tibbitts* (1880) 5 QBD 560, CA, and the judgments in *Castellain v Preston* (1883) 11 QBD 380, CA.

(where the principle of subrogation is explained); *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA.

5 Although he is bound to account to the insurers for the money received, he does not hold it as trustee for them: *Stearns v Village Main Reef Gold Mining Co* (1905) 10 Com Cas 89, CA, applying the principle of *Randal v Cockran* (1748) 1 Ves Sen 98.

6 For another striking illustration of the proposition that the insurer is subrogated to the assured's rights as regards his remedy for tort see *Assicurazioni Generali de Trieste v Empress Assurance Corpn Ltd* [1907] 2 KB 814; see also *The Welsh Girl* (1906) 22 TLR 475 (affd on appeal sub nom *The Commonwealth* [1907] P 216, CA); *The Charlotte* [1908] P 206, CA.

7 *The Yasin* [1979] 2 Lloyd's Rep 45.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(13) SUBROGATION/491. Extent of right.

491. Extent of right.

As between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished¹. The insurer's rights cannot be affected by any contract made by the assured with another insurer or any other person except so far as the assured is supposed to reserve the right of making such another contract, and the insurer to subscribe the policy under an implied condition that the assured may avail himself of that right².

It follows also from the principle of subrogation that if the assured should renounce any of his rights and remedies against third persons to which, but for the renunciation, the insurers would have been subrogated, the assured will have to answer to the insurers for the full value of the rights so renounced. In short, the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss³.

The insurer is not entitled to sue a third party in the name of the assured⁴ unless the assured has assigned to the insurer his right of action⁵.

The right of subrogation may be waived by the insurer⁶, and there may be an implied term in the policy that he will not exercise it against a co-assured⁷.

1 *Castellain v Preston* (1882) 11 QBD 380 at 388, CA, per Brett LJ. The meaning of 'condition' in this portion of the judgment of Brett LJ seems doubtful. The word appears in the report in the Law Reports and the Law Journal, but not in that of the Law Times. 'The law has long been settled in England and Wales ... that an insurer who has fully indemnified an insured against a loss covered by a contract of insurance between them may ordinarily enforce, in the insurer's own name, any right of recourse available to the insured': *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4 at [11], [2002] 1 All ER (Comm) 321 at [11], [2002] 1 Lloyd's Rep 553 at [11], per Lord Bingham of Cornhill. An insurer who has paid the whole amount due under the policy will not be subrogated to the assured's rights against third parties if the amount paid is insufficient to give the assured a complete indemnity: *Driscoll v Driscoll* [1918] 1 IR 152 (fire insurance). If, however, the subject matter is insured for the full amount of the insured value, insurers who have paid the full amount insured as for a total loss are subrogated to sums recoverable from third parties, even though those sums are calculated on the basis of a value higher than the insured value: *Thames and Mersey Marine Insurance Co v British and Chilian Steamship Co* [1915] 2 KB 214; affd on this point [1916] 1 KB 30, CA. The same principle was applied to a case of partial loss in *Goole and Hull Steam Towing Co Ltd v Ocean Marine Insurance Co Ltd* [1928] 1 KB 589. In this case the cost of repairs exceeded the amount insured, but the insurers were held entitled to credit for the whole amount recovered from third parties in respect of the cost of repairs. The fact that hull and machinery were separately valued in the policy was held to be immaterial to the question of subrogation, the sole object of the separate valuation being to enable the assured to exercise the option conferred by the appropriate Institute Clause of claiming average on each valuation separately or on the whole. Where a freight policy incorporated the Institute Clause which provided that in the event of total loss, whether absolute or constructive, of the vessel the amount underwritten by the policy should be paid in full, and the hull policy also incorporated an Institute Clause to the effect that in the event of total or constructive total loss no claim for freight should be made by the insurers, the freight insurers were held to be subrogated to freight earned by the vessel after she had become a constructive total loss: *Coker v Bolton* [1912] 3 KB 315. See also PARA 493 post. Insurers are entitled by subrogation to recover interest for the period after they have paid the loss: *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA. As to the Institute Clauses see PARA 330 ante.

2 2 Phillips' Law of Insurance (5th Edn) s 1715, cited with approval by Lord Wright MR in *Boag v Standard Marine Insurance Co Ltd* [1937] 2 KB 113 at 125, [1937] 1 All ER 714 at 722, CA (cargo insured first under a valued policy and subsequently under an increased value policy; first insurer entitled to the whole of the recoveries in respect of the goods).

3 *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226, CA; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216. The assured may give the third party a release subject to the insurer's rights of subrogation; but a release given to a third party by an assured, who has already to the knowledge of the third party received payment from his insurers, will not be effective to bar the insurers' right to be subrogated to the remedies against the third party. It was decided in *King v Victoria Insurance Co* [1896] AC 250, PC, that payment honestly made by insurers in satisfaction of a claim by the assured entitles them to the remedies available to the assured, even if the payment was not within the terms of the policy.

4 *Simpson v Thomson* (1877) 3 App Cas 279 at 293, HL; *The Charlotte* [1908] P 206, CA; *Oriental Fire and General Insurance Co Ltd v American President Lines Ltd and Cotton Trading Corp of San Francisco* [1968] 2 Lloyd's Rep 372, HC Bombay.

5 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216.

6 *The Marine Sulphur Queen* [1970] 2 Lloyd's Rep 285, Dist Ct, Southern Dist NY; *Tenneco Oil Co v Tug Tony and Coastal Towing Corp* [1972] 1 Lloyd's Rep 514, Dist Ct, Southern Dist Texas (Houston Division).

7 *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd (Carillion Construction Ltd, Pt 20 defendants)* [2002] UKHL 17, [2002] 1 All ER (Comm) 918, [2002] 1 WLR 1419.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(13) SUBROGATION/492. Distinction between subrogation and rights arising on abandonment.

492. Distinction between subrogation and rights arising on abandonment.

In a case of total loss, the rights given by subrogation must be distinguished from those resulting from abandonment. By virtue of abandonment the insurers become entitled to the property in the thing insured and to all rights incident to the property, whereas by subrogation they become entitled to rights and remedies which may not depend on the ownership of the thing insured. Thus, where the owners of an insured ship have been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the insurers as from the time of the casualty in respect of which the total loss is paid. For instance, the right to receive payment of freight accruing due, but not earned, at the time of the casualty is one of those rights incident to the property in the ship, and it therefore passes to the insurers on abandonment. The right of the assured to recover damages from a third person is not, however, one of those rights which are incident to the property in the ship. It passes from the assured to the insurers, in case of payment for a total loss, only on the principle of subrogation; and it is on this principle that it passes likewise to the insurers who have satisfied a claim for a partial loss¹.

¹ *Simpson v Thomson* (1877) 3 App Cas 279 at 292, HL, per Lord Blackburn. The case of *North of England Iron Steamship Insurance Association v Armstrong* (1870) LR 5 QB 244 (where the ship sank in a collision, becoming an actual total loss, so that there was nothing to abandon; the case was, therefore, one of subrogation and not of abandonment), has been the subject of comment, both in Arnould on Marine Insurance (16th Edn) ss 1302-1306, and by Lord Blackburn and Lord Selborne in *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333, HL. The decision itself presents no difficulty, but there are certain obiter dicta in the judgments which seem to assume that by virtue of subrogation it might be possible for the insurer to recover more than the amount of the loss he has paid. It is submitted that, if this is the meaning of such dicta, they are erroneous, and are inconsistent with the essential principle of subrogation as well as with the judgment in *Sea Insurance Co v Hadden* (1884) 13 QBD 706, CA; see also *The Welsh Girl* (1906) 22 TLR 475 (affd on appeal sub nom *The Commonwealth* [1907] P 216, CA); and cf *Thames and Mersey Marine Insurance Co v British and Chilian Steamship Co* [1915] 2 KB 214 (affd [1916] 1 KB 30, CA), cited in PARA 491 note 1 ante; *Boag v Standard Marine Insurance Co Ltd* [1937] 2 KB 113 at 122, [1937] 1 All ER 714 at 719-720, CA, per Lord Wright MR. The judgment in *Sea Insurance Co v Hadden* supra was applied in *Glen Line Ltd v A-G* (1930) 36 Com Cas 1, HL (hull insurers not entitled either by abandonment or by subrogation to money paid under the Treaty of Versailles by way of compensation for loss of profits). See also *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330, [1961] 2 All ER 487 (criticising *North of England Iron Steamship Insurance Association v Armstrong* supra), where it was held that an insurer cannot recover more than he has paid; *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4, [2002] 1 All ER (Comm) 321, [2002] 1 Lloyd's Rep 553.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(13) SUBROGATION/493. Conditions limiting the principle of subrogation.

493. Conditions limiting the principle of subrogation.

The principle of subrogation is limited or qualified in its application by the conditions set out below:

- 124 (1) The insurer is entitled only to those remedies, rights or other advantages which are available to the assured himself. Thus, if two ships, A and B, are the property of the same owner, and A is sunk by the negligence of those in charge of B, the insurers on A, having paid as for a total loss, have no claim upon the owner, inasmuch as the owner cannot be answerable in damages to himself¹.
- 125 (2) The insurer is subrogated only to those rights possessed by the assured in respect of the thing to which the contract of insurance relates. Thus, where a vessel is damaged by collision, and her owners recover from those by whose negligence it was caused damages in respect of matters which are not covered by a policy on the ship, for example, demurrage or freight, the insurers cannot, on paying for a total loss, claim from the assured the amount of those damages².
- 126 (3) It is only on payment of the whole of the loss sustained by the assured, whether total or partial, that the insurer is entitled to be subrogated to his rights of action, so that if the amount insured is less than the amount of that loss, the insurers, even though they have paid the amount insured, will not be subrogated to those rights³. Therefore, the assured remains the person who has control of the suit in any proceedings brought by him against the person primarily liable, and will be entitled to compromise without the insurers' assent, provided always that he acts in good faith without any intention to sacrifice their interests⁴.
- 127 (4) The advantages to which the insurers by subrogation succeed include any payment made in diminution of the loss in respect of which the insurers are liable, and are not confined to those which the assured has a right to demand, but they do not include benefits in the nature of a voluntary gift which he may have received from a third person if those benefits were intended to be received by him for his own use alone and not to accrue to the insurer⁵.
- 128 (5) The application of the principle of subrogation may be excluded by the terms of the insurance policy or by any usage of trade to which it is subject⁶.

1 *Simpson v Thomson* (1877) 3 App Cas 279 at 284, HL, per Lord Cairns LC, and at 288 per Lord Penzance.

2 *Sea Insurance Co v Hadden* (1884) 13 QBD 706 at 718, CA, per Lindley LJ. Where a vessel is partially damaged by a collision, the insurer is entitled to deduct from the cost of repairs one-third new for old (see PARA 449 ante), whereas the tortfeasor has no right to make any such deduction. The practice in such a case is to divide the amount recovered from the wrongdoer rateably between the owners and the insurers; thus, the owner retains all damages awarded to him in respect of demurrage, and also the money paid in respect of the thirds, the insurer retaining such portion of the damages as are attributable to the two-thirds which he has paid.

3 See PARA 491 note 1 ante.

4 *Commercial Union Assurance Co v Lister* (1874) 9 Ch App 483 (a fire policy, but the principle of the decision applies equally to marine insurance).

5 *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333, HL, explained in *Stearns v Village Main Reef Gold Mining Co* (1905) 10 Com Cas 89, CA, in a manner inconsistent with the explanation of Brett LJ in *Castellain v Preston* (1883) 11 QBD 380 at 391, CA.

6 *Tate v Hyslop* (1885) 15 QBD 368, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(13) SUBROGATION/494. Property insured by persons having different interests.

494. Property insured by persons having different interests.

It often occurs that the same property is insured by persons who have different interests in it. For example, the owner, the carrier or other bailee of goods, the mortgagor and mortgagee, may insure the same property with different insurers, and in such a case difficult questions may arise between the various insurers as to their respective rights and liabilities between themselves. The answer to these questions is to be found by the correct application of the two principles of subrogation and contribution. The cases in which one or other of those two principles are to be applied have been judicially explained in the following manner¹.

If a third person (a bailee of the goods, or, indeed, any other person) is liable in contract or tort for the loss of the goods or for damage to them, the insurer who has insured the goods for the owner is subrogated to his rights against the third person, and it follows that any insurer with whom that third person has insured his liability will be ultimately liable for the loss, and cannot recover any contribution from the first insurer².

Where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. If each insures, although they may use words apparently insuring the whole property, they would recover from their respective insurers the value of their own interests, and, of course, those values added together would make up the value of the whole property. Therefore, it would not be a case either for subrogation or contribution, because the loss would be divided between the two insurers in proportion to the interests which the respective persons assured had in the property. Then there may be cases where, although two different persons insure in respect of different rights, each of them can recover the whole, as in the case of a bailor and bailee or mortgagor and mortgagee; in such a case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons, and, therefore, it must be that if both recover the full value of the property from their respective insurers, the insurer who has insured the person who has the remedy over is subrogated to that remedy³.

¹ *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583-585, CA, per Mellish LJ (a fire policy, but the principles laid down in the judgment apply equally to marine insurance). As to fire insurance see PARA 591 et seq post.

² See *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 584-585, CA, per Mellish LJ. As to contribution see further EQUITY; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq.

³ See *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583-584, CA, per Mellish LJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(14) DOUBLE INSURANCE/495. Meaning of 'double insurance'.

(14) DOUBLE INSURANCE

495. Meaning of 'double insurance'.

Where two or more policies are effected by or on behalf of the assured¹ on the same adventure and interest, or any part of it, and the sums insured exceed the indemnity allowed by the Marine Insurance Act 1906², the assured is said to be over-insured by double insurance³.

Where the assured is over-insured by double insurance, unless the policy otherwise provides, the assured may claim payment from the insurers in such order as he may think fit, provided he is not entitled to receive any sum in excess of the indemnity allowed by the Act⁴. Thus, if a merchant, the value of whose whole interest is £30,000, first effects a policy on this interest at Liverpool for £20,000, and then another policy on the same interest at London for £30,000, he can recover the whole amount of £30,000 on the London policy⁵.

Where the policy under which the assured claims is a valued policy⁶, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject matter insured⁷.

Where the policy is an unvalued policy⁸, he must give credit, as against the full insurable value, for any sum received by him under any other policy⁹.

The result is that the amount recoverable may sometimes depend on the order in which actions on different policies are instituted. Thus, if a ship is insured by policy A for £200,000 valued at £400,000, and by policy B for £200,000 valued at £300,000, and there is a total loss, the assured can recover £200,000 on policy B, and then claim £200,000 on policy A. If he first receives from the insurers on policy A £200,000, the sum insured by that policy, he can only claim on policy B the difference between £200,000 and the amount of the valuation (£300,000), that is £100,000¹⁰.

1 As to the use of the term 'the assured' see PARA 216 note 1 ante.

2 As to the indemnity allowed see the Marine Insurance Act 1906 s 16 (unvalued policy) and s 27 (valued policy); and PARAS 222-223, 432 ante. Nothing in the provisions of the Act relating to the measure of indemnity affects the rules relating to double insurance: s 75(2). As to the measure of indemnity see PARA 440 ante.

3 Ibid s 32(1).

4 Ibid s 32(2)(a). This provision embodies the law as laid down in *Newby v Reed* (1763) 1 Wm Bl 416; *Rogers v Davis* (1777) 2 Park's Marine Insurances (8th Edn) 601. Continental law on this subject differs from English law. It generally makes the successive policies protect the property in order of date, and United States policies usually contain a clause embodying substantially the Continental law. The policy may contain a warranty limiting the amount which the assured is permitted to insure: see PARA 239 note 1 ante.

5 *Rogers v Davis* (1777) 2 Park's Marine Insurances (8th Edn) 601.

6 For the meaning of 'valued policy' see PARA 222 ante.

7 Marine Insurance Act 1906 s 32(2)(b).

8 For the meaning of 'unvalued policy' see PARA 222 ante.

9 Marine Insurance Act 1906 s 32(2)(c). These provisions embody the law as laid down in *Bruce v Jones* (1863) 1 H & C 769, which virtually overruled *Bousfield v Barnes* (1815) 4 Camp 228.

10 See further Chalmers' Marine Insurance Act 1906 (10th Edn) 43, 49.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(14) DOUBLE INSURANCE/496. Right of contribution.

496. Right of contribution.

Where the assured is over-insured by double insurance¹, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract². If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and to the like remedies as a surety who has paid more than his proportion of the debt³.

Where the assured receives any sum in excess of the indemnity allowed by the Marine Insurance Act 1906⁴, he is deemed to hold that sum in trust for the insurers according to their right of contribution among themselves⁵.

1 See PARA 495 ante.

2 Marine Insurance Act 1906 s 80(1). In general, where several persons are co-guarantors for the same debt, and one of them is called upon to pay more than his share, he is entitled to contribution from the others proportionately to the amounts for which each is a guarantor: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq. See also *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318, and the notes thereto in 2 White & Tud LC (9th Edn) 496 et seq. How the total sum paid to the assured should be apportioned as between the different insurers is not settled by the Marine Insurance Act 1906 ss 32, 80, nor by any decided cases or established practice. An attempt to solve this problem is to be found in Arnould on Marine Insurance (16th Edn) ss 436-437.

3 Marine Insurance Act 1906 s 80(2); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq.

4 See PARA 495 note 2 ante.

5 Marine Insurance Act 1906 s 32(2)(d).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(14) DOUBLE INSURANCE/497. Insurances on different interests.

497. Insurances on different interests.

Double insurance¹ only arises where two or more policies are effected in the same interest. Where they are effected to cover different interests there can be no contribution among the insurers, but the principle of subrogation may then apply and limit the amount ultimately paid by all the insurers to the indemnity allowed by the Marine Insurance Act 1906².

¹ For the meaning of 'double insurance' see PARA 495 ante.

² See *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 576, 584, CA; *Godin v London Assurance Co* (1758) 1 Burr 489 at 495. See also the Marine Insurance Act 1906 ss 32(2)(d), 79; and PARAS 490, 496 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(i) Settlement of Losses/498. Settlement of loss.

(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM

(i) Settlement of Losses

498. Settlement of loss.

When a claim arises under a policy, the assured's broker, having ascertained the percentage of the loss, according to the usual practice indorses the percentage on the policy with the word 'settled' prefixed, and calls on the insurer to initial the indorsement. When the indorsement is initialled, the claim is said to be 'settled', or in earlier times the policy was said to be 'adjusted'¹. This settlement amounts to an acknowledgment by the insurer of his liability and an implied promise by him to pay the indorsed percentage, but it is only an accord without satisfaction, and the only consideration is the insurer's liability for the loss. It follows, therefore, from the ordinary principles of the common law that the insurer is not precluded from disputing his liability and showing that there is no consideration for the implied promise, even though at the time of settlement he had full means of knowledge².

¹ 'Settling the claim' describes the modern practice; 'adjusting the policy' describes the older practice to which most of the cases subsequently cited refer.

² See Lord Campbell's note to *Shepherd v Chewter* (1808) 1 Camp 274 at 276; *Steel v Lacy* (1810) 3 Taunt 285; *Reyner v Hall* (1813) 4 Taunt 725; *Luckie v Bushby* (1853) 13 B & C 864; and see *Kelly v Solari* (1841) 9 M & W 54.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(i) Settlement of Losses/499. Payment of loss after settlement.

499. Payment of loss after settlement.

If, after settlement, the insurer pays the loss, he cannot recover it unless it was paid under a mistake of fact or law¹. Where the loss is total at the time of settlement and is paid by the insurer under no mistake of fact, the money cannot be recovered by him on the ground that the constructive total loss² has subsequently been adeemed³.

If after a loss has been paid the insurer discovers that there was fraud, misrepresentation, non-disclosure or any other matter previously unknown to him which would have afforded a good defence to the claim, he can recover the money so paid from the assured, or from the broker who has effected the policy unless that broker has actually paid over the loss to the assured⁴ or accounted to him for the amount received in circumstances amounting to payment⁵. If the broker has merely placed the money received to the assured's credit in such circumstances that the account remains open, it can be recovered from the broker unless he has been induced by the insurer's conduct to alter his legal position⁶. It follows also from ordinary common law principles that if payments of losses have been made under compulsion of legal process, but under a mistake of fact, the money so paid cannot be recovered unless there has been such fraud as would enable the insurer to set aside the judgment or the process of the court⁷.

Where the insurer does not resist the claim upon a policy which is void for illegality, but pays the amount of the loss to the assured's broker, the assured is entitled to recover from the broker the amount of the loss, inasmuch as he can prove that the money was paid to his use, without alleging the illegality of the policy⁸.

1 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. The ability to recover is subject to the defences available in the law of restitution; and see MISTAKE vol 77 (2010) PARAS 74-76.

2 For the meaning of 'constructive total loss' see PARA 468 ante.

3 *Da Costa v Firth* (1766) 4 Burr 1966; and see *Blaauwpot v Da Costa* (1758) 1 Eden 130; *Brooks v MacDonnell* (1835) 1 Y & C Ex 500; *Tunno v Edwards* (1810) 12 East 488; *Goldsmid v Gillies* (1813) 4 Taunt 803. As to ademption of loss see PARA 489 ante. In *Holmes v Payne* [1930] 2 KB 301, the decision in *Da Costa v Firth* supra was applied to a case of non-marine insurance where an agreement had been made by the insurer to replace the lost article instead of paying a loss: see PARA 659 post.

4 *Buller v Harrison* (1777) 2 Cowp 565. As to misrepresentation generally see MISREPRESENTATION AND FRAUD.

5 *Holland v Russell* (1863) 4 B & S 14, Ex Ch. As to accounting which amounts to payment see PARA 276 ante. See also AGENCY vol 1 (2008) PARA 87; CONTRACT vol 9(1) (Reissue) PARA 1049.

6 *Buller v Harrison* (1777) 2 Cowp 565; explained in *Holland v Russell* (1861) 1 B & S 424 at 435 (affd (1863) 4 B & S 14, Ex Ch). See also AGENCY vol 1 (2008) PARA 162. The broker cannot retain the money in the exercise of his lien for unpaid premiums or on the ground that since he received the money he has given time to the assured for the payment of premiums: *Scottish Metropolitan Assurance Co Ltd v P Samuel & Co Ltd* [1923] 1 KB 348.

7 See *Marriot v Hampton* (1797) 7 Term Rep 269, and the notes thereto in 2 Smith's LC (13th Edn) 387. See also RESTITUTION vol 40(1) (2007 Reissue) PARA 47.

8 *Tenant v Elliott* (1797) 1 Bos & P 3; cf *Farmer v Russell* (1798) 1 Bos & P 296; *Bousfield v Wilson* (1846) 16 LJEx 44; and see AGENCY vol 1 (2008) PARA 85. As to the effect of illegality on the right to a return of premium see PARA 510 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(i) Settlement of Losses/500. Recovery of salvage by insurer.

500. Recovery of salvage by insurer.

After payment of a total loss, the insurer can recover the salvage or the proceeds of its sale from the assured¹ unless he is estopped from doing so, for instance by having paid less than the whole amount of insurance in full settlement of the claim².

¹ See the Marine Insurance Act 1906 s 79; *Roux v Salvador* (1836) 3 Bing NC 266 at 288, Ex Ch; and PARA 490 ante.

² *Brooks v MacDonnell* (1835) 1 Y & C Ex 500.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/501. Recovery of premium.

(ii) Return of Premium

501. Recovery of premium.

Where the premium, or a proportionate part of it, is by the Marine Insurance Act 1906 declared to be returnable¹, then if already paid, it may be recovered by the assured from the insurer, and if unpaid it may be retained by the assured or his agent².

¹ See the Marine Insurance Act 1906 s 84(3); and PARA 502 post. It is open to question whether the Act, in dealing with return of premiums, did not in some particulars alter the law: see PARA 510 post.

² Ibid s 82.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/502. Circumstances in which a premium is returnable.

502. Circumstances in which a premium is returnable.

Where the policy contains a stipulation for the return of the premium, or a proportionate part of it, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part, is thereupon returnable to the assured¹.

Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured². Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured³.

In particular:

- 129 (1) where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable⁴;
- 130 (2) where the subject matter insured, or part of it, has never been imperilled, the premium, or, as the case may be, a proportionate part of it, is returnable⁵, although, where the subject matter has been insured 'lost or not lost'⁶ and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at that time, the insurer knew of the safe arrival⁷;
- 131 (3) where the assured has no insurable interest throughout the currency of the risk, the premium is returnable unless the policy is effected by way of gaming or wagering⁸;
- 132 (4) where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable⁹;
- 133 (5) where the assured has over-insured under an unvalued policy¹⁰, a proportionate part of the premium is returnable¹¹;
- 134 (6) subject to the above provisions, where the assured has overinsured by double insurance¹² a proportionate part of the several premiums is returnable¹³; provided, however, that if the policies are effected at different times and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured by it, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable¹⁴.

1 Marine Insurance Act 1906 s 83. See further PARA 503 post.

2 Ibid s 84(1).

3 Ibid s 84(2). As to the return of premium on failure of consideration see PARA 505 post.

4 Ibid s 84(3)(a). As to fraud and illegality see PARA 510 post.

5 Ibid s 84(3)(b).

6 For the meaning of 'lost or not lost' see PARA 372 ante.

7 Marine Insurance Act 1906 s 84(3)(b) proviso. Cf s 6(1), Sch 1 r 1; and PARA 372 ante. The proviso is founded upon the consideration that in such a case the insurer has taken on himself the risk of the property being lost before the conclusion of the contract: see *Bradford v Symondson* (1881) 7 QBD 456, CA; *Natusch v Hendewerk* (1871) 7 QBD 460n.

8 Marine Insurance Act 1906 s 84(3)(c). As to gaming and wagering policies see further PARAS 386-387 ante.

9 Ibid s 84(3)(d).

10 For the meaning of 'unvalued policy' see PARA 222 ante.

11 Marine Insurance Act 1906 s 84(3)(e).

12 As to double insurance see PARAS 495-497 ante. See also PARA 508 post.

13 Marine Insurance Act 1906 s 84(3)(f).

14 Ibid s 84(3)(f) proviso.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/503. Express stipulations as to return of premium.

503. Express stipulations as to return of premium.

The parties are at liberty to stipulate that the happening of any specified event should entitle the assured to a return of a certain portion of the premium¹, and the policy often contains an express clause to that effect. It is usual to insert a clause in time policies² stipulating for the reduction of premium in the event of the vessel not being continuously employed during the whole of the insured period³.

1 See PARA 502 ante; and see *Ionides v Harford* (1859) 29 LJEx 36.

2 For the meaning of 'time policy' see PARA 222 ante.

3 See the Institute Time Clauses (Hulls) cl 23, and the Institute Time Clauses (Freight) cl 16; and as to those clauses generally see PARA 330 ante. As to the construction of such a clause see *Hunter v Wright* (1830) 10 B & C 714. See also *Pyman v Marten* (1906) 13 Com Cas 64, CA (construction of a clause providing that if the vessel were sold or transferred to a new management the policy should become cancelled and a pro rata return of premium be made); *Gorsedd Steamship Co v Forbes* (1900) 5 Com Cas 413 (construction of a clause providing for the return of a portion of the premium on the condition that the vessel should not be employed in certain specified trades or within a specified area). Where the policy stipulated for a return of premium while the vessel was 'laid up in port', evidence was given as to the customary meaning of this phrase, and it was held that it did not cover a period during which the insured vessel was bunkering HM ships at Portland: *North Shipping Co Ltd v Union Marine Insurance Co Ltd* (1919) 24 Com Cas 161, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/504. Apportionment of premium.

504. Apportionment of premium.

Where no usage is proved to the contrary, and no express stipulation to the contrary is contained in the policy, a premium paid in respect of one entire risk cannot be apportioned under the statutory provisions relating to return of premium on failure of consideration¹, unless it can be inferred from the contract that the parties had two or more distinct risks in contemplation².

¹ I.e. the Marine Insurance Act 1906 s 84; see PARA 502 ante.

² See *Stevenson v Snow* (1761) 1 Wm Bl 318; *Bermon v Woodbridge* (1781) 2 Doug KB 781 at 789; *Tyrie v Fletcher* (1777) 2 Cowp 666; *Gale v Machell* (1785) Marshall on Marine Insurances (4th Edn) 529; *Long v Allan* (1785) 4 Doug KB 276; better reported in Marshall on Marine Insurances (4th Edn) 529. These were very special cases in which the premium was held to be apportionable where the policy contained a warranty that the ship should depart with convoy for the voyage; they were at any rate decided to a very great extent on the evidence of usage. See also *Meyer v Gregson* (1784) 3 Doug KB 402; *Rothwell v Cooke* (1797) 1 Bos & P 172.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/505. Failure of policy to attach.

505. Failure of policy to attach.

The consideration for the payment of the premium is the risk which the insurer takes on himself. This consideration totally fails where from any cause no risk is incurred by the insurer, as where the subject matter insured has never been imperilled or the policy has not attached¹. This may happen by reason of a breach of an express or implied warranty, for instance where the ship is at the commencement of the risk unseaworthy², or where the ship does not sail on or before a certain day, or where the assured abandons the insured adventure at the outset³, or where there is a failure to disclose a material fact or misrepresentation (even if not fraudulent) on the part of the assured, in consequence of which the insurer repudiates the contract⁴. In the same way the insurer comes under no risk where throughout the currency of the risk the assured has no insurable interest⁵.

In all these cases the consideration wholly fails, and, therefore, provided there has been no fraud or illegality on the part of the assured or his agents⁶, and, in the case of the assured having no insurable interest throughout the currency of the risk, provided the policy is not effected by way of gaming and wagering⁷, the premium, if paid, can be recovered by the assured, and, if unpaid, is not recoverable by the insurer⁸.

1 See the Marine Insurance Act 1906 s 84(1), (3)(b); and PARA 502 ante. See also *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317; *Long v Allan* (1785) Marshall on Marine Insurances (4th Edn) 529; *Colby v Hunter* (1827) 3 C & P 7. As to attachment of risk see the Marine Insurance Act 1906 Sch 1 rr 2-4; and PARA 306 et seq ante.

2 See PARA 245 ante.

3 See PARAS 240, 323 ante.

4 *Feise v Parkinson* (1812) 4 Taunt 640; *Anderson v Thornton* (1853) 8 Exch 425. See *North-Eastern 100A Steamship Insurance Association v Red S SS Co* (1905) 10 Com Cas 245; affd (1906) 12 Com Cas 26, CA, where the ordinary rule as to return of premium was expressly excluded by the rules of the mutual assurance association. As to mutual assurance associations see PARAS 517-522 post. As to the effect of misrepresentation see PARAS 390, 408 et seq ante.

5 After the assured on ship and freight had completed the voyage and earned freight, the court ruled that he could not recover the premium on the ground that he had no insurable interest by reason of want of title to the ship: *M'Culloch v Royal Exchange Assurance Co* (1813) 3 Camp 406.

6 As to the effect of fraud or illegality see PARA 510 post.

7 See the Marine Insurance Act 1906 s 84(3)(c); and PARA 502 ante.

8 See *ibid* ss 82, 84(1); and PARAS 501-502 ante. Where the assured himself abandons the adventure, he ought, it seems, to give notice to the insurer before he brings his action to recover the premium: *Palyart v Leckie* (1817) 6 M & S 290; cf *Gatty v Field* (1846) 9 QB 431. Where the policy is effected by a broker the premium is due to the insurer from the broker: Marine Insurance Act 1906 s 53(1); and see PARA 271 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/506. Whole subject matter at risk.

506. Whole subject matter at risk.

If, on the true construction of the policy, the risk is entire and indivisible, then once the policy has attached there is no right to a return of premium in the absence of fraud¹. For instance, if the insurance is 'at and from' a particular place, the premium is not returnable, even if the ship is lost before sailing on the voyage². On the same principle, since a deviation, as distinguished from a change of voyage, only discharges the insurer from the time of deviation³, the assured is not entitled to a return of the premium⁴; and the termination of a defeasible interest does not entitle him to a return of premium⁵.

1 As to the effect of fraud on the insurer's part see PARA 510 post.

2 *Moses v Pratt* (1815) 4 Camp 297; *Annen v Woodman* (1810) 3 Taunt 299. For the meaning of 'at and from' see PARA 312 ante.

3 See PARA 323 ante.

4 *Hogg v Horner* (1797) 2 Park's Marine Insurances (8th Edn) 782n; *Tait v Levi* (1811) 14 East 481; *Tyrie v Fletcher* (1777) 2 Cowp 666; *Loraine v Thomlinson* (1781) 2 Doug KB 585; *Bermon v Woodbridge* (1781) 2 Doug KB 781.

5 Marine Insurance Act 1906 s 84(3)(d) (see PARA 502 ante); *Boehm v Bell* (1799) 8 Term Rep 154.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/507. Part only of subject matter at risk.

507. Part only of subject matter at risk.

Where part only of the subject matter insured is at risk, a proportionate part of the premium is returnable¹. Thus, if 100 bales of cotton are insured but only 50 are put on board, a return of half the premium must be made for short interest. Similarly, if the freight of a full cargo is insured and at the time of the loss a complete cargo is not at risk, there must be a proportionate return of premium².

¹ See the Marine Insurance Act 1906 s 84(3)(b); and PARA 502 ante. As to the effect of fraud or illegality see PARA 510 post.

² *Forbes v Aspinall* (1811) 13 East 323 (freight); *Rickman v Carstairs* (1833) 5 B & Ad 651; *Tobin v Harford* (1864) 34 LJCP 37, Ex Ch (cargo), afford examples of short interest, but no question of return of premium was there discussed. Cf *Eyre v Glover* (1812) 16 East 218 (profits).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/508. Over-insurance.

508. Over-insurance.

If under an unvalued policy¹ the assured has insured for £10,000 and the property at risk is only of the value of £7,500, a quarter of the premium is returnable, because the insurer could never be liable for more than three-quarters of the value of the amount insured². Where the assured has over-insured by double insurance³, a proportionate part of the several premiums is returnable⁴, subject to the statutory provisions previously mentioned⁵.

The principle on which the statutory provisions as to over-insurance and double insurance⁶ are founded is that if the risk in consideration of which the premium is paid is not in fact incurred, or is not incurred to the full extent contemplated, there is a failure of consideration in whole or in part in respect of which the insurer must return the premium or part of it⁷.

Where the over-insurance is by a single policy, all the insurers contribute rateably to the return of premium without regard to the date of their subscriptions. If there are several policies on the same subject matter and the sum insured exceeds the value of the subject matter, all the insurers on the several policies are liable to pay according to their respective subscriptions, and are therefore bound to make a return of premium for the excess of the sum insured over the value of the subject matter in proportion to their respective subscriptions⁸.

These rules of law relating to double insurances do not prevail on the continent of Europe. United States policies generally contain express provisions on the subject.

1 For the meaning of 'unvalued policy' see PARA 222 ante.

2 See the Marine Insurance Act 1906 s 84(3)(e); and PARA 502 ante. As to the effect of fraud or illegality on the right to the return of the premium see PARA 510 post.

3 As to double insurance see PARA 495 ante.

4 Marine Insurance Act 1906 s 84(3)(f); see PARA 502 ante.

5 See PARA 502 ante.

6 I.e. the Marine Insurance Act 1906 s 84(3)(e), (f); see text and notes 1-5 supra; and PARA 502 ante.

7 See further Arnould on Marine Insurance (16th Edn) s 1336.

8 Marshall on Marine Insurances (4th Edn) 516.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/509. Effect of material alteration.

509. Effect of material alteration.

Where a policy was avoided by reason of a material alteration when in the custody of the assured or his agent¹, before the passing of the Marine Insurance Act 1906 the law was that the premium was not returnable². However, it has yet to be decided whether the words of the statutory provision as to return of the premium where the policy is avoided by the insurer as from the commencement of the risk³ make the premium non-returnable in a case where the policy is so avoided before the risk has attached.

1 As to the avoidance of a policy in these circumstances see PARAS 265-266 ante.

2 *Langhorn v Cologan* (1812) 4 Taunt 330.

3 Ie the Marine Insurance Act 1906 s 84(3)(a): see PARA 502 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(ii) Return of Premium/510. Effect of fraud or illegality.

510. Effect of fraud or illegality.

Where the insurer has been induced to enter into the contract of insurance by the fraud of the assured or his agent, or where there has been illegality on the part of the assured, and the policy is avoided by the insurer, the assured cannot recover the premium¹. On the other hand, where the assured has been induced to enter into the contract by the insurer's fraud, and consequently repudiates the contract, the premium must be returned².

Where the policy is effected by way of gaming or wagering, the premium is not returnable³.

According to common law principles, if the policy was void on the ground of its illegality and the assured withdrew from the contract before the policy had attached, on giving the insurer notice of the withdrawal the assured could recover the premium⁴. He would be entitled to do so because he could prove failure of consideration without relying on or alleging the illegality of the policy⁵. It seems, however, that this rule of law, which has been strongly questioned by eminent judges, is no longer applicable to marine insurance, and that, whether or not the policy has attached, the premium is not returnable if the policy is void by reason of illegality⁶.

¹ Marine Insurance Act 1906 s 84(3)(a): see PARA 502 ante; *Rivaz v Gerussi Bros & Co and Gerussi* (1880) 6 QBD 222, CA; *Tyler v Horne* (1785) Marshall on Marine Insurances (4th Edn) 525; *Chapman v Fraser* (1793) Marshall on Marine Insurances (4th Edn) 525.

² See PARAS 390-391 ante; and see *Duffell v Wilson* (1808) 1 Camp 401; *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL. If an insurer insures a ship 'lost or not lost' knowing that she has arrived in safety, the premium is returnable: see the Marine Insurance Act 1906 s 84(3)(a); and PARA 502 ante; *Carter v Boehm* (1766) 3 Burr 1905.

³ See the Marine Insurance Act 1906 s 84(3)(a), (c); and PARA 502 ante. See also the Marine Insurance (Gambling Policies) Act 1909 s 1(1); and PARAS 386-387 ante. Cf *Evanson v Crooks* (1911) 106 LT 264; *Elson v Crookes* (1911) 106 LT 462, DC; *Howarth v Pioneer Life Assurance Co Ltd* (1912) 107 LT 155, DC (life assurance).

⁴ *Palyart v Leckie* (1817) 6 M & S 290.

⁵ *Lowry v Bourdieu* (1780) 2 Doug KB 468 at 471 per Buller J. See also *Tappenden v Randall* (1801) 2 Bos & P 467; *Aubert v Walsh* (1810) 3 Taunt 277; *Taylor v Bowers* (1876) 1 QBD 291, CA; *Hermann v Charlesworth* [1905] 2 KB 123, CA.

⁶ Cf the Marine Insurance Act 1906 s 84(3)(a); and see PARA 502 ante. See *Morck v Abel* (1802) 3 Bos & P 35; *Lubbock v Potts* (1806) 7 East 449; *Re National Benefit Assurance Co Ltd* [1931] 1 Ch 46. Where the insurer raises the defence of illegality, the assured may recover the premium if when the policy was effected he was ignorant of the fact which rendered it illegal: *Oom v Bruce* (1810) 12 East 225; *Henry v Staniforth* (1816) 4 Camp 270, sub nom *Hentig v Staniforth* 5 M & S 122; *Siffken v Allnutt* (1813) 1 M & S 39. As to the effect of misrepresentation by the insurer or his agent as to the legality of the insurance see also *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; and as to the general rule in all branches of insurance see further PARA 136 et seq ante. If the illegality is due to the fraud or negligence of the agent who effected the policy, the agent may be liable in damages to the assured: see *Connors v London and Provincial Assurance Co* (1913) 47 ILT 148 (life assurance).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/511. Pleading and practice.

(iii) Practice and Evidence

511. Pleading and practice.

The principles of pleading and practice in the case of proceedings on a marine insurance policy are, in general, the same as in any other commercial claim, but the following special points should be noted¹. Where the assured brings an action for a total loss and the evidence proves only a partial loss, then, unless the policy otherwise provides he may recover for a partial loss², but where the assured merely proves that the ship has sustained some damage without giving any evidence as to its extent, he can recover only nominal damages³. Where constructive total loss⁴ is pleaded, particulars must be given of the general nature of the injuries to the vessel and of the heads of expense relied upon, but there is no obligation to particularise the detailed cost of repairs⁵. Where the insurers allege that the insured vessel was lost as a result of wilful misconduct on the part of the assured, the court may order that they must give further information⁶.

Where there is a general averment of interest in the entire subject matter insured, the claimant who proves an interest in part may recover to that extent⁷.

The court will prevent its process from being abused and therefore will not allow the assured to recover the full amount of his loss where he has already received the premium under a plea of payment into court⁸.

A reinsurer has been held entitled to bring an action for premiums on behalf of himself and all the other reinsurers who were jointly entitled to the premium under the reinsurance contract⁹.

1 The history and practice of pleading contracts of marine insurance are discussed in *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78 at 82 et seq by Baillache J. 'Commercial claim' means any claim arising out of the transaction of trade or commerce and includes any claim relating to insurance and reinsurance: CPR 58.1. As to commercial proceedings generally see CIVIL PROCEDURE vol 12 (2009) PARA 1536 et seq. As to evidence generally see CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq.

2 Marine Insurance Act 1906 s 56(4); see PARA 479 ante, and *Gardiner v Croasdale* (1760) 2 Burr 904.

3 *Tanner v Bennett* (1825) Ry & M 182.

4 For the meaning of 'constructive total loss' see PARA 468 ante.

5 *Transport and Trading Co Ltd v Indemnity Mutual Marine Assurance Co Ltd* [1919] WN 48, CA.

6 *Palamisto General Enterprises SA v Ocean Marine Insurance Co Ltd, The Dias* [1972] 2 QB 625, [1972] 2 All ER 1112, CA, disapproving a long standing practice to the contrary; *Astrovlanis Compania Naviera SA v Linard, The Gold Sky* [1972] 2 QB 611, [1972] 2 All ER 647, CA.

7 *Rising v Burnett* (1798) Marshall on Marine Insurances (4th Edn) 570; *Page v Rogers* (1785) Marshall on Marine Insurances (4th Edn) 570.

8 *Carr v Royal Exchange Assurance Corp'n, Carr v Montefiore* (1864) 34 LJQB 21. As to the person in whose name proceedings may be brought in the case of assignment of money due under the policy see *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw* [1907] 1 KB 116; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA.

9 *Janson v Property Insurance Co Ltd* (1913) 30 TLR 49.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/512. Disclosure of ship's papers.

512. Disclosure of ship's papers.

Since the end of the eighteenth century it has been the practice of the courts to grant disclosure to a larger extent in matters arising out of policies of marine insurance than in other civil actions¹. This more extensive disclosure is granted by means of an order for the disclosure of ship's papers². The practice is peculiar, and strictly limited, to marine insurance³. The reasons for the practice are that a contract of marine insurance is one of utmost good faith, and, to a special extent during a marine transit, the knowledge and means of knowledge as to what happens to the subject of the insurance are with the assured, and these reasons govern the extent and application of the practice⁴.

If, in proceedings relating to a marine insurance policy, the underwriters apply for specific disclosure⁵ the court may order a party to produce all the ship's papers and require him to use his best endeavours to obtain and disclose documents which are not or have not been in his control⁶.

The granting of an order for ship's papers is within the court's discretion⁷, and the Court of Appeal will be slow to interfere with the exercise of the discretion⁸. In cases where scuttling is alleged, an order for ship's papers before service of the defence should not be made automatically⁹.

1 *Goldschmidt v Marryat* (1809) 1 Camp 559; *Rayner v Ritson* (1865) 35 LJQB 59; *China Steamship Co v Commercial Assurance Co* (1881) 8 QBD 142, CA.

2 For an account of the historical development of the order see *Leon v Casey* [1932] 2 KB 576 at 579-582, CA, per Scrutton LJ.

3 *China Traders' Insurance Co v Royal Exchange Assurance Corp*n [1898] 2 QB 187 at 189, CA, per A L Smith LJ; *Daily Express (1908) Ltd v Mountain* (1916) 32 TLR 592, CA, in which, at 593, Swinfen Eady LJ observed that every attempt to extend the rule to other cases of insurance had failed.

4 *China Steamship Co v Commercial Assurance Co* (1881) 8 QBD 142 at 148, CA.

5 Specific disclosure means disclosure under CPR 31.12; see further CIVIL PROCEDURE vol 11 (2009) PARA 547.

6 CPR 58.14(1).

7 See CPR 31.12(1).

8 *Keevil and Keevil v Boag* [1940] 3 All ER 346 at 348, CA, per Goddard LJ.

9 *Probatina Shipping Co Ltd v Sun Insurance Office Ltd* [1974] QB 635, [1974] 2 All ER 478 at 492, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/513. Extent of disclosure of ship's papers.

513. Extent of disclosure of ship's papers.

The papers and documents to be included in a list of ship's papers are not merely those in the claimant's possession but also those in the possession of other persons interested in the insurance, and all material documents relating to the adventure, in whosoever possession they may be¹.

These special rights of disclosure apply to proceedings in respect of policies on goods shipped as well as in respect of the ship, and extend beyond the original parties to the insurance to all persons interested on the same side as the claimant even though they are not parties to the insurance², and also to an insurer when suing his reinsurer³. Further, they apply as against the defendants where insurers who have paid claims under a policy in excess of the amount due bring proceedings against the assured to recover the amount overpaid, at any rate where the insurers do not admit the claims and were led to pay them by misrepresentation, as such proceedings arise substantially out of a policy of marine insurance⁴.

1 *Teneria Moderna la Franco Española v New Zealand Insurance Co* [1924] 1 KB 79, CA.

2 *West of England Bank v Canton Insurance Co* (1877) 2 Ex D 472; *China Steamship Co v Commercial Assurance Co* (1881) 8 QBD 142 at 145, CA; *London and Provincial Marine and General Insurance Co v Chambers* (1900) 5 Com Cas 241. 'All persons interested' does not include other insurers, but only persons on the claimant's side (*China Steamship Co v Commercial Assurance Co* supra); but where mortgagees are suing it includes the mortgagor or his representative, who had sailed the ship as managing owner (*West of England Bank v Canton Insurance Co* supra). It includes a foreign owner, even if out of the jurisdiction, and also a mortgagee (*Graham Joint Stock Shipping Co Ltd v Motor Union Insurance Co Ltd* [1922] 1 KB 563, CA), and the fact that the person from whom the disclosure can be obtained is out of the jurisdiction will not prevent the proceedings being stayed until he gives disclosure if he is in reality, although not in name, the claimant (*Willis & Co v Baddeley* [1892] 2 QB 324, CA).

3 *China Traders' Insurance Co v Royal Exchange Assurance Corp* [1898] 2 QB 187 at 191-193, CA.

4 *Boulton v Houlder Bros & Co* [1904] 1 KB 784 at 789, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/514. Where policy includes transit by land.

514. Where policy includes transit by land.

If the insurance is substantially a marine insurance, an order for disclosure of ship's papers may be made notwithstanding that the policy also includes some transit by land¹. Where the insurance is of an inland transit, part of that transit being by water, and proceedings are brought on the policy in respect of a loss on land, an order for ship's papers will not be made². If that policy contained a clause under which risks of carriage by ships were covered, and proceedings were brought under that clause for a loss on an ocean transit, then different considerations would apply and disclosure of ship's papers might be ordered³.

1 *Harding v Busell* [1905] 2 KB 83, CA, questioning *Henderson v Underwriting and Agency Association* [1891] 1 QB 557; *Village Main Reef Gold Mining Co v Stearns* (1900) 5 Com Cas 246; see also *Leon v Casey* [1932] 2 KB 576, CA (warehouse to warehouse clause). See generally CARRIAGE AND CARRIERS.

2 *Schloss v Stevens* (1905) 10 Com Cas 224, CA.

3 *Tannenbaum & Co v Heath* [1908] 1 KB 1032 at 1037, CA, per Lord Alverstone CJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/515. Duty imposed by order for ship's papers.

515. Duty imposed by order for ship's papers.

The duty imposed by an order for ship's papers¹ is not an absolute duty to produce, but to give disclosure and to produce or to explain fully the inability to produce².

A party so ordered must use his best endeavours to obtain and disclose documents which are not or have not been in his control³.

The application for the order for ship's papers may be made at any stage in the proceedings and on such terms, if any, as to staying the proceedings or otherwise as the court thinks fit⁴.

1 CPR 58.14 (as to which see PARA 512 ante) contains, but does not define, directly or by reference, the term 'ship's papers'; nor is there any longer a prescribed form for the order. The combined effect of CPR 31.12 and CPR 58.14, 15 is that the papers (or classes of them) must be specified in the order drafted by the applicant. Formerly RSC Ord 72 r 10 (revoked) prescribed the use of Form 94 for ordering the production of certain documents in marine insurance actions, and that form listed the documents which were covered by such an order. It may be useful to refer to the old Form 94 for the papers which may be considered ship's papers, though that list may no longer be taken as conclusive of the documents which are so included.

Thus, Form 94 required the claimant (the assured) and all persons interested in the proceedings and in the insurance, to give disclosure to the defendant, his solicitors or agents by list verified by witness statement or affidavit of specified documents and to allow them to inspect those documents. The list was required to contain details of all insurance slips, policies, letters of instruction or other orders for effecting such slips or policies, or relating to the insurance or the subject matter of the insurance on the ship or the cargo on board or the freight; also all documents relating to the sailing or alleged loss of the ship, cargo or freight, and all correspondence with any person relating in any manner to the effecting of the insurance on the ship, cargo or freight, or any other insurance effected on the ship, cargo or freight, on the voyage insured by the policy sued on or any other policy effected on the ship, cargo or freight on the same voyage. The same persons had also to disclose all correspondence between the captain or agent of the ship and any other person with the owner or any person before the commencement of or during the voyage on which the alleged loss happened, and all books and documents, whatever their nature and whether originals, duplicates or copies, which in any way related or referred to the matters in question in the action.

This form was originally prescribed in 1925 consequent upon the observations of the court in *Graham Joint Stock Shipping Co Ltd v Motor Union Insurance Co Ltd* [1922] 1 KB 563, CA; and *Teneria Moderna Franco Española v New Zealand Insurance Co* [1924] 1 KB 79, CA. It was criticised, and the use of a modified form in appropriate cases encouraged, in *Probatina Shipping Co Ltd v Sun Insurance Office Ltd* [1974] QB 635 at 642, [1974] 2 All ER 478 at 494-495, CA, per Lord Denning MR, at 644-645 and 496 per Buckley LJ, and at 651-652 and 502 per Roskill LJ.

2 See *Leon v Casey* [1932] 2 KB 576 at 581, CA, per Scrutton LJ.

3 CPR 58.14(1)(b); and see PARA 512 ante.

4 CPR 58.14(2); and see *Harding v Bussell* [1905] 2 KB 83, CA. Where the order contains a direction that all further proceedings be stayed this does not mean that all activity in preparing the case must come to an end, and a successful party who obtains an order for costs may recover costs properly incurred whilst the stay is in operation: *Pecheries Ostenddaïses SA v Merchants' Marine Insurance Co* [1928] 1 KB 750, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(15) RECOVERY OF LOSSES AND RETURN OF PREMIUM/(iii) Practice and Evidence/516. Evidence.

516. Evidence.

The rules of evidence applicable to policies of marine insurance are generally the same as those which apply to all other cases¹. Questions as to the materiality of matters represented or not disclosed, or as to what is reasonable diligence, reasonable time or reasonable premium, are in cases of marine insurance questions of fact and not of law².

1 See generally CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq. As to the exceptional effect, in cases of loss by capture, given to the judgment by a foreign prize court and rendering it conclusive, not only as to the fact of condemnation, but also as to the grounds of it, see PARA 244 ante; and CONFLICT OF LAWS; ESTOPPEL; PRIZE vol 36(2) (Reissue) PARA 839.

2 Marine Insurance Act 1906 ss 18(4), 20(7), 88. See also PARAS 327 note 4, 393, 409 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/517. Risks undertaken by mutual insurance associations.

(16) MUTUAL INSURANCE ASSOCIATIONS

517. Risks undertaken by mutual insurance associations.

Where two or more persons mutually agree to insure each other against marine losses, there is said to be a mutual insurance¹.

Mutual insurance associations, called 'protection and indemnity associations', indemnify their members against certain liabilities which are not covered by the ordinary form of policy, such as liability for claims by members of the crew, for life salvage, for the loss of or damage to goods carried on their ships, for the quarter of the damages consequent on collision which is not covered by the ordinary collision clause², for wreck removal³, or for damage to piers, jetties etc. Some associations also undertake the conduct of legal proceedings in respect of such matters as the recovery of freight, dead freight and demurrage, and claims by cargo owners⁴. Other associations give protection against war risks⁵.

1 Marine Insurance Act 1906 s 85(1). As to the origin and nature of mutual insurance associations and the statutory provisions relating to them see PARAS 27-30 ante. See also PARA 520 post. As to reinsurance agreements in respect of war risks between the Secretary of State and certain mutual insurance associations see PARA 812 post.

2 See PARA 449 ante

3 *M J Rudolph Corp v Lumber Mutual Fire Insurance Co (Luria International, third parties), The Cape Borer* [1975] 2 Lloyd's Rep 108, Dist Ct, Eastern Dist NY.

4 See *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49, [1976] 3 All ER 243, CA.

5 See eg *Union-Castle Mail Steamship Co Ltd v United Kingdom Mutual War Risks Association Ltd* [1958] 1 QB 380, [1958] 1 All ER 431; *Atlantic Maritime Carriers SA v Hellenic Mutual War Risks Association Ltd* [1969] 1 Lloyd's Rep 359, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/518. Special clauses peculiar to mutual insurance.

518. Special clauses peculiar to mutual insurance.

Mutual insurances are made subject to the articles of association and to the mutual insurance association's rules and regulations which are usually by express reference incorporated in the policy¹. These generally contain some special clauses peculiar to such associations. For instance, in insurances on freight there is often a rule or clause that the interest insured is to be the amount entered in the association, which amount is to be paid in the event of the total loss of the ship entered².

¹ *Muirhead v Forth and North Sea Steamboat Mutual Insurance Association* [1894] AC 72, HL; *Re Albert Average Association, Blythe & Co's Case* (1872) LR 13 Eq 529.

² See *United Kingdom Mutual Steamship Assurance Association Ltd v Boulton* (1898) 3 Com Cas 330.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/519. Liability for improper navigation of ship.

519. Liability for improper navigation of ship.

A further loss against which protection associations¹ indemnify the shipowner is liability for damage to goods on board when caused by the improper navigation of the ship. Damage is caused by the improper navigation of the ship where, owing to the negligence of the shipowner or his employees, whether before or after the commencement of the voyage, the carriage of goods is rendered unsafe and damage ensues², but where the cargo is damaged by putting it into the ship's hold which is not properly cleaned, this is not improper navigation, because it does not detract from the safety of the vessel for the voyage³.

1 As to protection associations see PARA 517 ante.

2 *Good v London Steamship Owners' Association* (1871) LR 6 CP 563; *Carmichael v Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887) 19 QBD 242, CA; *The Warkworth* (1884) 9 PD 145, CA.

3 *Canada Shipping Co v British Shipowners' Mutual Protection Association* (1889) 23 QBD 342, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/520. Rules of construction applicable to mutual insurance.

520. Rules of construction applicable to mutual insurance.

In general, the provisions of the Marine Insurance Act 1906 apply to a mutual insurance¹. The same rules of construction as are applicable to ordinary marine insurances apply to insurances effected in mutual insurance and protection and indemnity associations, except so far as they are modified by the terms of the policies issued by the association or by its rules and regulations².

¹ Marine Insurance Act 1906 s 85(4). See also PARA 30 ante.

² Ibid s 85(3). As to the rules of construction of marine policies see generally paras 226-231 ante. As to a rule that the insurances should be renewed from year to year unless the member or association gives notice to terminate the insurance see *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179, Ex Ch. As to a rule which provides that no policy issued by the association is to be dealt with so as to part with any beneficial interest in the policy without the association's consent, and as to other similar rules see *Laurie v West Hartlepool Steamship Thirds Indemnity Association and David* (1899) 4 Com Cas 322; *Hutchinson v Wright* (1858) 25 Beav 444; *North Eastern 100A SS Insurance Association v Red S Steamship Co* (1906) 12 Com Cas 26, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/521. Position of part owners not being members.

521. Position of part owners not being members.

The question sometimes arises, where mutual insurance associations are defendants or claimants, whether there can be claims for losses or contributions by or against part owners of vessels insured other than members. This question depends in each case upon the particular rules of the association concerned and the form of its policies, so no general rules on the subject can be usefully laid down¹.

Similarly, the question whether a rule incorporated in a policy of mutual insurance is a warranty² the non-compliance with which discharges the insurers, or is only an exception from the risks insured against, is a question of construction depending on the language of that rule and the nature of the risk to which it relates³.

1 The following are cases on this subject: *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370; *United Kingdom Mutual Steamship Assurance Association Ltd v Nevill* (1887) 19 QBD 110, CA; *Great Britain 100 A1 Steamship Insurance Association v Wyllie* (1889) 22 QBD 710, CA; *Ocean Iron Steamship Insurance Association Ltd v Leslie* (1887) 22 QBD 722n; *British Marine Mutual Insurance Co v Jenkins* [1900] 1 QB 299.

2 As to the nature of warranties in marine insurance contracts, and as to compliance with warranties, see generally para 235 et seq ante.

3 *Stewart v Wilson* (1843) 12 M & W 11; *Dewa Gungadhur Sailing Ship Co Ltd v United Kingdom Marine Mutual Insurance Association Ltd* (1886) 2 TLR 366; *Williams v British Mutual Marine Insurance Co* (1887) 3 TLR 314, CA (affg (1886) 3 TLR 274); *Colledge v Harty* (1851) 6 Exch 205; *Harrison v Douglas* (1835) 3 Ad & El 396. Club time policies sometimes contain a rule that the policy is to be renewed on the expiration of the period for which it was originally issued, in the absence of ten days' notice to the contrary.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/3. MARINE INSURANCE/(16) MUTUAL INSURANCE ASSOCIATIONS/522. Estoppel.

522. Estoppel.

Even if no policy has been issued by an association, the association may, by its conduct in admitting the receipt for the claimant of the amount of the loss, render itself liable for the loss¹, and conversely a member of a mutual association may be estopped from denying his liability for calls on losses².

1 *Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872) LR 14 Eq 148. Cf *Edwards v Aberayron Mutual Ship Insurance Society* (1876) 1 QBD 563, Ex Ch; and see ESTOPPEL.

2 *Barrow Mutual Ship Insurance Co Ltd v Ashburner* (1885) 54 LJQB 377, CA. Cf *Re London Marine Insurance Association, Smith's Case* (1869) 4 Ch App 611. A policyholder need not necessarily be a member or liable to contribute as such: see *W R Corfield & Co v Buchanan* (1913) 29 TLR 258, HL, cited in PARA 29 note 2 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/4. AVIATION INSURANCE/523. Civil liabilities of air transport operators.

4. AVIATION INSURANCE

523. Civil liabilities of air transport operators.

The civil liabilities of operators of aircraft are governed mainly by statutory provisions which have modified the liabilities which would otherwise have attached to those persons at common law. The statutory liabilities imposed on operator carriers are considered generally elsewhere in this work¹. The liabilities which may arise at common law, so far as they are not excluded by statute, in respect of the operation of aircraft are also considered generally elsewhere².

1 See AIR LAW vol 2 (2008) PARAS 615-640.

2 See AIR LAW vol 2 (2008) PARAS 647-651.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/4. AVIATION INSURANCE/524. Insurable risks of an air transport operator.

524. Insurable risks of an air transport operator.

The development of air transport legislation has left an aircraft operator with several main heads of public liability to cover by insurance, namely:

- 135 (1) absolute liability to persons on land or water who have sustained personal injury or damage to their property;
- 136 (2) absolute liability to passengers on international carriage within certain limitations on the amount payable;
- 137 (3) absolute liability to passengers on non-international carriage, subject to certain limitations on the amount payable;
- 138 (4) absolute liability in respect of registered baggage or cargo carried, subject to certain limitations on the amount payable;
- 139 (5) liability based on negligence, for example to another aircraft and its passengers where there is a collision in the air, or to a passenger carried gratuitously by someone other than an air transport undertaking¹.

Insurance against any or all of these liabilities thus came into existence as a branch of public liability insurance².

Apart from insurance against third party liabilities, an operator may also effect insurance against loss or damage to his aircraft. The Secretary of State's powers to reinsure, and to insure, aircraft and cargoes against war risks are considered subsequently³.

1 As to the legislation governing carriage by air and the liabilities arising thereunder see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121 et seq.

2 For instances of decisions relating to aviation insurance see *Dunn v Campbell* (1920) 4 Ll L Rep 36, CA (where the period of insurance ran 'from the date and time of the first flight', and it was held that the policy attached from the time when the first flight began and covered an accident which happened whilst the pilot was attempting to take off but before he had left the ground); *Alliance Aeroplane Co Ltd v Union Insurance Society of Canton Ltd* (1902) 5 Ll L Rep 406 (exception against racing held to apply to a competitive flight to Australia, although not at racing speed); *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476 (onus of proof of breach of condition: see further PARA 111 ante); *Obalski Chibougainau Mining Co v Aero Insurance Co* [1932] SCR 540 (denial of liability on policy insuring seaplane, on the ground that the machine was flown contrary to government regulations and was not airworthy); *Aslan v Imperial Airways Ltd* (1933) 149 LT 276 (implied warranties by carriers of bullion by air); *Arundell v Provident Mutual Life Assurance Association* (1934) 78 Sol Jo 319 (licence, in life policy, to fly on particular expedition limited to flying on that expedition); *Ilford Airways Ltd v Stevenson* (1957) 21 WWR 78 (whether aircraft was 'in flight' at time of accident); *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep 301, HL (aircraft destroyed on the ground at Beirut airport by members of the armed forces of Israel); *Pan American World Airways Inc v Aetna Casualty and Surety Co* [1975] 1 Lloyd's Rep 77, US Ct of Apps (whether insurers of hijacked aircraft could repudiate liability on the ground that the loss fell within an exception); *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] 1 All ER (Comm) 481, [1999] 1 Lloyd's Rep 803, HL (war risks; removal of aircraft and spares by Iraqi troops).

3 See PARAS 812-817 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(i) The Basis of the Contract/525. Nature of life insurance.

5. LONG TERM INSURANCE

(1) IN GENERAL

(i) The Basis of the Contract

525. Nature of life insurance.

A contract of life insurance in its strict form may be defined as a contract under which the insurers undertake, in consideration of specified premiums being continuously paid throughout the life of a particular person, to pay a specified sum of money upon the death of that person¹. The particular person whose life forms the subject matter of the insurance need not be the person who pays the premiums; it may be a third party².

¹ *Dalby v India and London Life Assurance Co* (1854) 15 CB 365 at 387, Ex Ch, per Parke B. As to taxation affecting life insurance see PARA 19 ante; and INCOME TAXATION.

² Except where otherwise stated, the policy, for the purposes of this part of the title, is taken to be a policy upon the life of the insured. For the general principles applicable to life insurance as well as to other kinds of non-marine insurance see PARA 36 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(i) The Basis of the Contract/526. Life policies for specified periods; endowment policies.

526. Life policies for specified periods; endowment policies.

A term policy is a life insurance policy in a strict form but limited for a period of years. The policy is upon the terms that death is to be the sole contingency upon which payment is due but the policy is only to run for a specified period, so that nothing is payable if the insured survives the period¹. An endowment policy² is a policy the basic feature of which is the provision of a capital sum on a given date if the insured so long survives, with or without a provision for the making of a payment, or a repayment of premiums, if he dies before that date.

1 See *Lockyer v Offley* (1786) 1 Term Rep 252 at 260.

2 See further PARAS 563-566 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(i) The Basis of the Contract/527. Broad meaning of life insurance.

527. Broad meaning of life insurance.

Life insurance for many purposes has a broader meaning than the strict one given previously¹ and includes endowment insurance². It has been said that the essential feature of a contract of life insurance, in this broad sense, is that it is a contract relating in any way to human life³. This is perhaps too wide; a public liability or employer's liability policy, in so far as it provides indemnity against death claims, could be said to relate to human life, but it could not for that reason be regarded in any real sense as a life policy⁴. However, it is provided by statute that for certain purposes any instrument under which the payment of money is assured on the happening of any contingency dependent on the duration of human life is a contract of life insurance⁵; and, apart from express statutory provision, life insurance in the broader sense comprises any contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another party⁶. Thus, a contract providing for the payment of a lump sum to the insured at the expiration of a given period, but containing a stipulation for return of premiums to the insured's estate if he dies during that period, is a contract of life insurance for the purpose of a restriction on the carrying on of the business of life insurance contained in a company's memorandum of association⁷. A contract where the measure of the benefit payable on surrender is the same as that payable on death is a contract of life insurance⁸, as is a contract by which a sum is payable on the assured's death within a specified period and a larger sum if he is alive at the end of the period⁹.

A person entering a contract of long term insurance may have the right to withdraw from it within a specified period¹⁰.

1 As to the meaning of 'life insurance' see PARA 525 ante.

2 As to endowment insurance see PARA 526 ante; and notes 6, 7 infra.

3 *Joseph v Law Integrity Insurance Co Ltd* [1912] 2 Ch 581 at 594, CA, per Farwell CJ. For the purpose of the regulation of insurance business under the Financial Services and Markets Act 2000 contracts of insurance on human life are 'contracts of long term insurance': see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt II para I; and PARAS 21-23 ante.

4 *Lancashire Insurance Co v IRC* [1899] 1 QB 353 at 359 per Bruce J; but see *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 835.

5 See eg the Policies of Assurance Act 1867 s 7; and PARA 548 note 1 post.

6 See *Joseph v Law Integrity Insurance Co Ltd* [1912] 2 Ch 581 at 591, CA; *Gould v Curtis* [1913] 3 KB 84 at 91, CA, per Cozens-Hardy MR (citing and approving Bunyon's Law of Life Assurance (4th Edn) 1).

7 *Joseph v Law Integrity Insurance Co Ltd* [1912] 2 Ch 581, CA; *Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597n, CA.

8 *Fuji Finance Ltd v Aetna Life Insurance Co Ltd* [1997] Ch 173, [1996] 4 All ER 608, CA.

9 *Gould v Curtis* [1913] 3 KB 84, CA.

10 See PARA 72 note 1 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(i) The Basis of the Contract/528. Industrial assurance.

528. Industrial assurance.

A somewhat specialised form of life insurance has developed where premiums are payable, usually in very small sums, at short intervals. Such insurances, where the premiums are received by means of collectors and are payable at intervals of less than two months, are called industrial assurance¹, and are subject to special statutory provisions². The industrial assurance legislation applies to industrial assurance companies³ and registered friendly societies which carry on industrial assurance business, and such societies are known as collecting societies⁴. Registered friendly societies are also subject generally to certain provisions of friendly society legislation affecting their power to effect life insurances⁵.

1 See the Industrial Assurance Act 1923 s 1(2) (repealed with savings). This provision continues in effect with amendments: Financial Services and Markets Act 2000 (Consequential Amendments and Savings) (Industrial Assurance) Order 2001, SI 2001/3647, art 3, Sch 1 Pt I. The method of collection and the frequency of payment of the premium may be altered by agreement: Sch 1 Pt I para 2.

2 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2088.

3 See INDUSTRIAL ASSURANCE.

4 As to industrial assurance companies see INDUSTRIAL ASSURANCE.

5 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(ii) Event Insured Against/529. Death as stipulated contingency.

(ii) Event Insured Against

529. Death as stipulated contingency.

Under a policy of life insurance in the strict sense the event which gives the right to payment is death during the currency of the policy¹. Generally the cause of the death is immaterial. All cases of death, whether due to natural or accidental² causes, fall within the policy; even death caused by the wilful act of a third party is covered³.

1 *Lockyer v Offley* (1786) 1 Term Rep 252.

2 Accidental death may also fall within the scope of a personal accident policy: see PARA 567 et seq post.

3 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA. Although the fact that the insured was killed by a third party does not affect the liability of the insurers to pay the policy money, it may affect the title to the policy money since it is contrary to public policy that a man not mentally disordered who has killed another should be allowed to benefit from his crime: see *Cleaver v Mutual Reserve Fund Life Association* supra (insurance effected by husband on his life for benefit of wife under the Married Women's Property Act 1882 s 11; wife murdered husband; wife unable to recover under policy; policy money formed part of husband's estate).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(ii) Event Insured Against/530. Death caused by murder, manslaughter or suicide.

530. Death caused by murder, manslaughter or suicide.

As a matter of public policy a person may not benefit from his own criminal act¹. Thus a person who murders the insured will not benefit under a policy of life insurance on the deceased's life². The same applies in the case of manslaughter³ or of unlawfully aiding, abetting, counselling or procuring the death of the insured⁴. However, the court may modify this rule where it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to it to be material, the justice of the case requires the effect of the rule to be so modified in that case⁵.

Suicide is no longer a crime⁶, but it is a general principle of insurance law that a person may not recover under an insurance policy where he has caused the insured event to occur by his own deliberate act, and so an insurer will be able to avoid making payment under a life insurance policy if the insured takes his own life⁷. However, it is common for policies to include an exception providing that no payment will be made where suicide occurs within a specified period, such as one year. In such a case if the insured commits suicide after the specified period the policy will not be avoided and the insurer must make payment⁸.

The courts have in the past refused to enforce payment under a life insurance policy where the insured has been executed for his crime⁹.

1 *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602, HL; *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA; and see the Forfeiture Act 1982 s 1(1).

2 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA.

3 *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA. This may, however, depend on the circumstances of the case: see the judgment of Salmon LJ.

4 See the Forfeiture Act 1982 s 1(2); *Dunbar v Plant* [1998] Ch 412, [1997] 4 All ER 289, CA (aiding and abetting suicide); *Re S* [1996] 1 WLR 235, [1996] 3 FCR 357.

5 Forfeiture Act 1982 s 2; *Dunbar v Plant* [1998] Ch 412, [1997] 4 All ER 289, CA; and see WILLS vol 50 (2005 Reissue) PARAS 341-342.

6 Suicide Act 1961 s 1.

7 *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 595, [1938] 2 All ER 602 at 604, HL, per Lord Atkin.

8 *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602, HL. At the time when this case was decided suicide was a crime and the court therefore applied the rule of public policy referred to in the text and the policy was avoided. It is submitted that the case would be decided differently now. As to such an exception see further PARA 531 post.

9 *Amicable Society v Bolland* (1830) 4 Bli NS 194. It is submitted that the position now would depend on the specific circumstances of each case.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(ii) Event Insured Against/531. Death due to excepted perils.

531. Death due to excepted perils.

The policy may, by the express terms of an exceptions clause, exclude liability on the part of the insurers if death results in particular circumstances or from exposure to specified hazards¹.

In practice, the only exception which calls for consideration is the exception against suicide². In the absence of some indication to the contrary, an exception against suicide covers all cases of intentional self-destruction³. Hence the exception applies even though the insured was unbalanced or even mentally disordered to a degree provided he knew what he was doing and was capable of appreciating the consequences⁴. On the other hand, if he was incapable of appreciating the nature of his act, his self-destruction is not intentional and the exception does not apply⁵. The policy may, however, be so worded as to cover all cases of self-destruction whether intentional or not⁶. In any of these cases the onus is as always on the insurers to establish that the conditions of the exceptions clause are fulfilled⁷, and if the cause of death is left open the policy is not avoided⁸.

1 Similar exceptions may be contained in personal accident policies. As to exceptions see generally para 99 ante. An exception avoiding the policy if the insured engages in military service abroad without the consent of the insurers, except under legal compulsion, is not void as contrary to public policy: *Duckworth v Scottish Widows' Fund Life Assurance Society* (1917) 33 TLR 430.

2 As to the effect of such an exception where it is limited in time see PARA 530 ante. As to the effect of the exception upon the rights of assignees see PARA 547 post.

3 *Borradaile v Hunter* (1843) 5 Man & G 639; *Clift v Schwabe* (1846) 3 CB 437, Ex Ch; *Dufaur v Professional Life Assurance Co* (1858) 25 Beav 599; *Rowett, Leaky & Co v Scottish Provident Institution* [1927] 1 Ch 55, CA.

4 *Clift v Schwabe* (1846) 3 CB 437 at 464, Ex Ch, per Rolfe B.

5 *Borradaile v Hunter* (1843) 5 Man & G 639 at 654 per Maule J; *Clift v Schwabe* (1846) 3 CB 437 at 465, Ex Ch, per Patteson J; *Stormont v Waterloo Life and Casualty Assurance Co* (1858) 1 F & F 22; see also *Dormay v Borradaile* (1847) 5 CB 380.

6 *White v British Empire Mutual Life Assurance Co* (1868) LR 7 Eq 394; *Ellinger & Co v Mutual Life Insurance Co of New York* [1905] 1 KB 31, CA.

7 *Stormont v Waterloo Life and Casualty Assurance Co* (1858) 1 F & F 22; *Rowett, Leaky & Co v Scottish Provident Institution* [1927] 1 Ch 55 at 66, CA, per Lord Hanworth MR; and see further PARA 99 text and note 6 ante.

8 *Harvey v Ocean Accident and Guarantee Corp*n [1905] 2 IR 1, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iii) Circumstances affecting the Risk/532. What facts are material.

(iii) Circumstances affecting the Risk

532. What facts are material.

The subject matter of a life insurance policy is a human life. Although death is bound to occur, it is an uncertain event in that it is uncertain when it will happen¹. Since the premium is based upon the average duration of human life², any facts which tend to suggest that the life insured is likely to fall short of the average duration are material facts³. It follows that the usual personal details, which are sufficient in other branches of insurance to identify the insured and to inform the insurers as to the nature of the risk⁴, will need to be amplified. In practice the details required are usually indicated by the questions and declarations contained in the proposal form.

1 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J.

2 *Thomson v Weems* (1884) 9 App Cas 671 at 681, HL, per Lord Blackburn.

3 Similar facts are material in personal accident insurance and accordingly cases on personal accident insurance are referred to here. As to material facts see further PARA 38 ante.

4 As to such details see PARA 56 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iii) Circumstances affecting the Risk/533. Materiality of insured's age, health, habits and history.

533. Materiality of insured's age, health, habits and history.

Information is normally required by the insurers as to the insured's age¹. However, by their conduct the insurers may be precluded from relying upon any misstatement of age². If in the proposal form there is a further question as to the date of birth and the date of birth inserted is inconsistent with the age stated, the issue of the policy may be a waiver of the inaccuracy³.

As well as a general statement that the insured is in sound health⁴ at the date of the proposal⁵, the insurers usually require a statement that he is not suffering from any disorder tending to shorten life⁶. Mental illness, particularly if it is such as to affect bodily health, should be disclosed⁷.

Information as to the habits and pursuits of the insured, including whether he is a smoker, is usually required, and a statement that the insured is of sober and temperate habits may be required⁸. Questions relating to hazardous sports may be asked, and there is usually a general question whether there are any circumstances in the occupation, habits or pursuits of the insured rendering him peculiarly liable to accident or disease⁹.

Information respecting the insured's history is generally sought. There is usually a question inquiring whether the insured¹⁰ has ever suffered¹¹ from certain specified diseases¹²; and there may be a general question requiring any illness¹³ or accident¹⁴, consultation of a medical practitioner¹⁵ or any operation¹⁶ during a specified period to be disclosed. Particulars of the insured's usual¹⁷ medical attendant¹⁸, and of any other medical practitioner consulted by him¹⁹ within a specified period, are usually required, together with the names of persons who are acquainted with the insured, and who may be referred to for information. Those who are referred to for information, whether they are medical practitioners or not, are not the agents of the insured to give information and consequently any fraud, misrepresentation or non-disclosure on their part is not to be imputed to the insured²⁰.

1 Where the life insured is that of a third party, not the insured himself, the information required is normally the same. A statement as to weight and height may also be required: *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229 (personal accident).

2 *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365.

3 *Keeling v Pearl Assurance Co Ltd* (1923) 129 LT 573.

4 The fact that disease is latent in the system does not make the statement inaccurate: *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC; cf *Ross v Bradshaw* (1761) 1 Wm Bl 312.

5 Any change in health after the date of the proposal and before its acceptance must be notified: *Morrison v Muspratt* (1827) 4 Bing 60; *British Equitable Insurance Co v Great Western Rly Co* (1869) 38 LJCh 314; *Canning v Farquhar* (1886) 16 QBD 727, CA; *Harrington v Pearl Life Assurance Co Ltd* (1914) 30 TLR 613, CA; *Looker v Law Union and Rock Insurance Co Ltd* [1928] 1 KB 554; see generally para 43 ante. The proposer is not deemed to be fully aware of the state of his internal organs: see *Life Association of Scotland v Forster* (1873) 11 Macph 351, Ct of Sess; *Delahaye v British Empire Mutual Life Assurance Co* (1897) 13 TLR 345, CA; and para 47 ante.

6 *Watson v Mainwaring* (1813) 4 Taunt 763; *Swete v Fairlie* (1833) 6 C & P 1; *Jones v Provincial Insurance Co* (1857) 3 CBNS 65; *Hutton v Waterloo Life Assurance Co* (1859) 1 F & F 735.

7 *Lindenau v Desborough* (1828) 8 B & C 586.

8 *Thomson v Weems* (1884) 9 App Cas 671, HL; see also *Southcombe v Merriman* (1842) Car & M 286; *Dennan v Scottish Widows' Fund Life Assurance Society* (1887) 3 TLR 347, CA. It has been said that the

statement refers to the use or abuse of alcohol, and not to drug habits: *Yorke v Yorkshire Insurance Co* [1918] 1 KB 662 at 666 per McCardie J.

9 For such a question see *Australian Widow's Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd* [1914] AC 634 at 635, PC; and see also *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA.

10 The question may include relatives of the insured: *Anderson v Fitzgerald* (1853) 4 HL Cas 484; see also *Duff v Gant* (1852) 20 LTOS 71.

11 The statement does not refer to isolated symptoms not connected with disease: *Chattock v Shawe* (1835) 1 Mood & R 498; cf *Geach v Ingall* (1845) 14 M & W 95.

12 *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; *British Equitable Insurance Co v Musgrave* (1887) 3 TLR 630; see also *Willis v Poole* (1780) 2 Park's Marine Insurances (8th Edn) 935.

13 *Cazenove v British Equitable Assurance Co* (1860) 29 LJCP 160, Ex Ch; *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515. A miscarriage is not an illness within the meaning of the question: *Anstey v British Natural Premium Life Association Ltd* (1908) 99 LT 765, CA.

14 A question of this kind must be read with some qualification; the insured cannot be expected to recollect and disclose every trivial disease or every trivial accident for the whole of his life: *Connecticut Mutual Life Insurance Co of Hartford v Moore* (1881) 6 App Cas 644 at 648, PC; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA; *Yorke v Yorkshire Insurance Co* [1918] 1 KB 662. Questions of this kind do not relate to members of the insured's family unless they are mentioned: *Duff v Gant* (1852) 20 LTOS 71.

15 *Kumar v Life Insurance Corp of India* [1974] 1 Lloyd's Rep 147. Advice, treatment or counselling for a disease requires knowledge that the insured is suffering from the disease on the part of the doctor; advice etc for the symptoms of a later diagnosed disease is not sufficient: *Cook v Financial Insurance Co Ltd* [1998] 1 WLR 1765, [1999] Lloyd's Rep IR 1, HL.

16 *Kumar v Life Insurance Corp of India* [1974] 1 Lloyd's Rep 147, where a Caesarean incision was held to be an operation.

17 This word implies that he has attended more than once: *Huckman v Fernie* (1838) 3 M & W 505 at 520 per Lord Abinger CB. Hence, it does not apply to a medical attendant who attends the insured's family and is acquainted with the insured, if he does not attend the insured: *Everett v Desborough* (1829) 5 Bing 503; *Huckman v Fernie* (1838) 3 M & W 505; *Hutton v Waterloo Life Assurance Co* (1859) 1 F & F 735.

18 The last medical attendant ought to be named: *Morrison v Muspratt* (1827) 4 Bing 60; *Cazenove v British Equitable Assurance Co* (1860) 29 LJCP 160, Ex Ch. If the medical attendant is changed after the date of the proposal, the change ought to be communicated: *British Equitable Insurance Co v Great Western Rly Co* (1869) 38 LJCh 314.

19 A medical practitioner giving a hypodermic injection is included in this expression: *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd* [1925] AC 344 at 349, PC.

20 *Wheelton v Hardisty* (1858) 8 E & B 232, Ex Ch, distinguishing *Maynard v Rhode* (1824) 1 C & P 360; *Everett v Desborough* (1829) 5 Bing 503; and *Rawlins v Desborough* (1840) 2 Mood & R 328. The truth of their statements may, however, be warranted: *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA. As to declarations warranting the proposal see PARA 62 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iii) Circumstances affecting the Risk/534. Medical examination.

534. Medical examination.

The insured may be required to submit to examination by a medical practitioner nominated by the insurers. In the course of the examination questions may be put to him. These questions must be answered honestly, but unless the truth of the answers is warranted their inaccuracy does not affect the validity of the policy¹.

¹ *Delahaye v British Empire Mutual Life Assurance Co* (1897) 13 TLR 245, CA; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, CA. No person may apply to a medical practitioner for a medical report on any individual to be supplied to him for insurance purposes unless (1) that person ('the applicant') notifies the individual that he proposes to make the application, and (2) the individual notifies the applicant that he consents to the making of the application: Access to Medical Reports Act 1988 s 3(1). As to that Act see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 215.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/A. THE LIFE ASSURANCE ACT 1774/535. Position at common law.

(iv) Insurable Interest

A. THE LIFE ASSURANCE ACT 1774

535. Position at common law.

At common law insurances by way of gaming or wagering were valid subject to certain qualifications¹. In 1745 an Act² was passed to prohibit policies dispensing with proof of interest and other policies by way of gaming or wagering in relation to British ships and merchandise³. In 1774 a further Act was passed to prohibit insurances on lives or other events except where the persons insuring have an interest⁴.

1 As to such insurances see PARA 386 ante.

2 Marine Insurance Act 1745 (repealed).

3 For the development of the law and the legislation at present in force in relation to marine policies unsupported by insurable interests see PARA 386 ante.

4 Life Assurance Act 1774. This Act, which is sometimes called the Gambling Act, remains in force; for its provisions and effect see PARAS 538-544 post. The provisions of the Act do not apply to such a contract as is mentioned in the Land Drainage Act 1991 s 1, Sch 2 para 1(3): see WATER AND WATERWAYS vol 101 (2009) PARA 571.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/A. THE LIFE ASSURANCE ACT 1774/536. Effect of statutory provisions.

536. Effect of statutory provisions.

No insurance is to be made on the life or lives of any person or persons, or on any other event or events whatsoever, where the person or persons for whose use or benefit, or on whose account, the policy is made has no interest, or by way of gaming or wagering; every insurance made contrary to this provision is void¹.

No policy may be made on the life or lives of any person or persons, or other event or events, without inserting the name or names of the person or persons interested or for whose use, benefit or on whose account the policy is made². However, a policy for the benefit of unnamed persons from time to time falling within a specified class or description is not invalid if the class or description is stated in the policy with sufficient particularity to make it possible to establish the identity of all persons who at any given time are entitled to benefit under the policy³.

No greater sum may be recovered from the insurers than the amount or value of the insured's interest in the life or event insured⁴.

These provisions apply to documents not transactions; so unless the transaction is expressed in a document which is capable of being treated as a policy, the Act cannot apply⁵.

1 Life Assurance Act 1774 s 1; *Fuji Finance Ltd v Aetna Life Insurance Co Ltd* [1997] Ch 173, [1996] 4 All ER 608, CA. See further PARAS 539-542 post.

2 Life Assurance Act 1774 s 2; see further PARA 543 post.

3 Insurance Companies Amendment Act 1973 s 50(1). This section applies to policies effected before the passing of the Act (25 July 1973) as well as to policies effected after that date: s 50(2).

4 Life Assurance Act 1774 s 3; see further PARA 544 post.

5 *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484 at 493 per Hawkins J; *Cook v Field* (1850) 15 QB 460. The Marine Insurance Act 1745 (repealed) applied to contracts which were in substance insurances even if not contained in policies: *Kent v Bird* (1777) 2 Cowp 583; *Morgan v Pebrer* (1837) 3 Bing NC 457.

UPDATE

536 Effect of statutory provisions

TEXT AND NOTES 1, 4--Where two people are civil partners, each of them is to be presumed for the purposes of the Life Assurance Act 1774 s 1 to have an interest in the life of the other, and for the purposes of s 3 there is no limit on the amount of value of the interest: Civil Partnership Act 2004 s 253.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/B. INSURANCES SUBJECT TO THE LIFE ASSURANCE ACT 1774/537. Application of statutory provisions.

B. INSURANCES SUBJECT TO THE LIFE ASSURANCE ACT 1774

537. Application of statutory provisions.

The Life Assurance Act 1774, although it refers in its long title to life insurance only, is not in its operative language so limited. Consequently, it has been held to apply also to personal accident insurance¹ and generally to insurances upon events². It is not, however, of universal application. Insurances on ships, goods and merchandise are expressly excluded from its operation³; and this exclusion has been held to extend to policies of motor insurance⁴ and to policies on money held by collectors of an insurance company⁵. There are also special statutory provisions extending the effect of the Act in the case of friendly societies and industrial assurance companies⁶.

There are, therefore, many important branches of insurance which are not within the statute⁷, and it is only necessary to consider its operation in detail in relation to life insurance.

1 *Shilling v Accidental Death Insurance Co* (1857) 2 H & N 42.

2 *Paterson v Powell* (1832) 9 Bing 320; *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67; see also *Roebuck v Hammerton* (1778) 2 Cowp 737; *Mollison v Staples* (1778) 2 Park's Marine Insurances (7th Edn) 640n. The contract must, however, be a contract of insurance: *Cook v Field* (1850) 15 QB 460.

3 Life Assurance Act 1774 s 4.

4 *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282.

5 *Prudential Staff Union v Hall* [1947] KB 685. As to the application of the Life Assurance Act 1774 to fire insurance see PARA 607 post.

6 See INDUSTRIAL ASSURANCE.

7 I.e. including (in addition to motor insurance) marine insurance, fire insurance (so far as it relates to goods) and burglary insurance.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/538. Life insurances not covered by the Life Assurance Act 1774.

C. SCOPE OF STATUTORY REQUIREMENTS

538. Life insurances not covered by the Life Assurance Act 1774.

Even in the case of life insurance, certain insurances have been held to be exempt from the operation of the Life Assurance Act 1774 as not being within its scope¹. These insurances are insurances by the insured upon his own life², provided that the insurances are for his own benefit³, and insurances by husbands and wives upon each other's lives⁴.

¹ As to the interpretation of statutes by reference to the mischief of the statute see STATUTES vol 44(1) (Reissue) PARA 1474.

² *Griffiths v Fleming* [1909] 1 KB 805 at 820-821, CA, per Farwell LJ and Kennedy LJ; see also *M'Farlane v Royal London Friendly Society* (1886) 2 TLR 755, DC.

³ *Wainwright v Bland* (1836) 1 M & W 32; *M'Farlane v Royal London Friendly Society* (1886) 2 TLR 755, DC; and see PARA 543 text and note 5 post.

⁴ *Griffiths v Fleming* [1909] 1 KB 805, CA. See also the Married Women's Property Act 1882 s 11 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 274, 276.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/539. Pecuniary interest required.

539. Pecuniary interest required.

The first requirement of the Life Assurance Act 1774 is insurable interest¹. It must be a pecuniary interest², in the sense that it is reasonably capable of valuation in money³, and its amount must be measured by the pecuniary loss which the person for whose benefit the insurance is effected is likely to sustain by reason of the death of the life insured⁴.

1 See the Life Assurance Act 1774 s 1; and PARA 536 ante.

2 *Halford v Kymer* (1830) 10 B & C 724 at 728 per Lord Tenterden; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 625, HL, per Lord Buckmaster.

3 *Simcock v Scottish Imperial Insurance Co Ltd* 1902 10 SLT 286; *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807.

4 *Halford v Kymer* (1830) 10 B & C 724 at 728 per Lord Tenterden CJ; *Hebden v West* (1863) 3 B & S 579. Insurers who quote for and so price and are paid premiums to undertake risks should meet the liabilities agreed to be undertaken unless there are matters of law or fact which compel another conclusion: *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm) at [182], [2002] 2 All ER (Comm) 492 at [182], [2002] Lloyd's Rep IR 807 at [182] per Langley J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/540. Pecuniary interest of parties to a contract and of creditors.

540. Pecuniary interest of parties to a contract and of creditors.

Where in the event of one party to a contract dying there will be a frustration of the contract¹ and such frustration is likely to cause pecuniary loss to the other party, the latter has a sufficient pecuniary interest in the life of the former². Similarly, creditors have an insurable interest in the lives of their debtors³ and employers and employees in the lives of each other⁴.

1 As to the frustration of a contract through the death of a party see CONTRACT vol 9(1) (Reissue) PARA 903.

2 It is sufficient for the purposes of the Life Assurance Act 1774 (see PARA 539 ante): *Anderson v Edie* (1795) 2 Park's Marine Insurances (8th Edn) 914; *Lea v Hinton* (1854) 5 De GM & G 823; *Branford v Saunders* (1877) 25 WR 650. The contract, however, must be lawful: *Dwyer v Edie* (1788) 2 Park's Marine Insurances (8th Edn) 914.

3 *Anderson v Edie* (1795) 2 Park's Marine Insurances (8th Edn) 914; *Von Lindenau v Desborough* (1828) 3 C & P 353; *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch.

4 *Hebden v West* (1863) 3 B & S 579.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/541. Pecuniary interest of relatives.

541. Pecuniary interest of relatives.

In the case of relatives, other than husbands and wives¹, an insurable interest may not be presumed from the mere existence of the relationship; the pecuniary interest must be proved. Parents² and children³, brothers and sisters⁴, or other relatives⁵ have, as such, no insurable interest in each other's lives. For the purpose of establishing an interest in such cases, it is sufficient that the insured is under a legal obligation to pay the funeral expenses of the life insured but, except in the exceptional cases in which an insurance for funeral expenses is still valid under the special legislation relating to industrial assurance and to friendly societies⁶, a mere moral obligation is insufficient⁷. A person who fosters a child privately⁸ or who maintains a protected child⁹ is deemed to have no insurable interest in the life of the child¹⁰. Friendly societies and industrial assurance companies are only obliged to pay up to £800 on the death of a child under ten years of age, except where the money is payable to a person who has an interest in the life of the child on whose death the money is payable¹¹.

1 As to insurance between husbands and wives see PARA 538 text and note 4 ante.

2 See *Halford v Kymer* (1830) 10 B & C 724; *Worthington v Curtis* (1875) 1 ChD 419, CA.

3 See *Howard v Refuge Friendly Society* (1886) 54 LT 644; *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *Elson v Crookes* (1911) 106 LT 462.

4 *Evanson v Crooks* (1911) 106 LT 264; cf *Forgan v Pearl Life Assurance Co* (1907) 51 Sol Jo 230.

5 See *Greenslade v London and Manchester Industrial Insurance Co Ltd* (1913) 48 L Jo 330.

6 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081 et seq; and INDUSTRIAL ASSURANCE.

7 *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *Tofts v Pearl Life Assurance Co Ltd* [1915] 1 KB 189, CA.

8 For the meaning of 'foster a child privately' see the Children Act 1989 s 66(1) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1049.

9 For the meaning of 'protected child' see the Adoption Act 1976 s 32(1) (repealed by the Adoption and Children Act 2002 s 139(3), Sch 5 as from a date to be appointed under s 148).

10 Children Act 1989 s 66(5), Sch 8 para 11; Adoption Act 1976 s 37(2) (repealed by the Adoption and Children Act 2002 Sch 5 as from a date to be appointed under s 148).

11 Friendly Societies Act 1992 s 99 (amended by SI 2001/2617; SI 2001/3647). The provision is extended to trade unions by the Trade Union and Labour Relations (Consolidation) Act 1992 s 19(1) (amended by SI 1993/3804; SI 2001/3649).

UPDATE

541 Pecuniary interest of relatives

NOTES 9, 10--2002 Act s 139(3), Sch 5 now in force: SI 2005/2213, SI 2005/2897.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/542. Payment to persons without interest.

542. Payment to persons without interest.

The Life Assurance Act 1774¹ applies only as between the insurers and the person claiming payment under the policy; if the insurers pay over the policy money without objecting to the absence of interest, any question that may arise as to the person really entitled to the money is to be determined as if the statute did not exist².

¹ As to the Life Assurance Act 1774 generally see PARAS 535-536 ante.

² *Worthington v Curtis* (1875) 1 ChD 419, CA; *A-G v Murray* [1904] 1 KB 165, CA; cf *Re Policy No 6402 of Scottish Equitable Life Assurance Society* [1902] 1 Ch 282.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/543. Name of person interested to be inserted in policy.

543. Name of person interested to be inserted in policy.

The second requirement of the Life Assurance Act 1774¹ is that the name of the person interested must be inserted in the policy². Where, therefore, the insured effects the insurance for the benefit of another, the name³ of the person intended to benefit must appear in the policy as well as the name of the insured⁴. For this purpose it is necessary to take into account the object of the insurance and not its form. Hence, where the policy purports to be an insurance by the insured upon his own life, but its real object is to benefit another, the policy is void unless the other person is named in it⁵. On the other hand, a person such as a trustee, having an interest in the life of another, may insure it in his own name without naming the beneficiary⁶.

1 As to the first requirement see PARA 539 ante.

2 Life Assurance Act 1774 s 2; *Mollison v Staples* (1778) 2 Park's Marine Insurances (7th Edn) 640n; *Hodson v Observer Life Assurance Society* (1857) 8 E & B 40. However, it has been stated that this requirement was not intended to apply to indemnity insurance: *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA; *Siu Yin Kwan (Administratrix of the Estate of Chan Ying Lung) v Eastern Insurance Co Ltd* [1994] 2 WLR 370, PC (a policy taken out in the name of shipping agents which did not name employers, could nevertheless have been enforced by the employers). As to the position where unnamed persons from time to time falling within a specified class or description are included in a policy see the Insurance Companies Amendment Act 1973 s 50(1); and PARA 536 text and note 3 ante.

3 I.e. the personal name, not a description such as 'relative or friend': *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 at 290 per Roche J.

4 *Shilling v Accidental Death Insurance Co* (1857) 2 H & N 42; subsequent proceedings (1857) 27 LJEx 16, (1858) 1 F & F 116.

5 *Evans v Bignold* (1869) LR 4 QB 622; *Forgan v Pearl Life Assurance Co* (1907) 51 Sol Jo 230. See also *Shilling v Accidental Death Insurance Co* (1857) 2 H & N 42 (subsequent proceedings (1857) 27 LJEx 16, (1858) 1 F & F 116); and see PARA 538 text and note 3 ante.

6 *Tidswell v Ankerstein* (1792) Peake 204 (insurance by executor on life of grantor of annuity forming part of the estate). In *Collett v Morrison* (1851) 9 Hare 162, both were named.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(1) IN GENERAL/(iv) Insurable Interest/C. SCOPE OF STATUTORY REQUIREMENTS/544. Date for valuing interest.

544. Date for valuing interest.

The third requirement of the Life Assurance Act 1774¹ is that no more can be recovered than the value of the interest². It is not, however, necessary in order to enable a person to enforce a policy of insurance upon the life of another, that his interest should continue until the death of the life insured³; it is sufficient that he had an interest at the commencement of the risk⁴. He need not, therefore, prove that he has sustained a loss by reason of the death, the contract not being a contract of indemnity in the strict sense⁵. Thus, in the case of a creditor whose insurable interest is founded upon the existence of a debt, the repayment of the debt by the debtor in his lifetime, though it removes the risk of pecuniary loss and puts an end to the creditor's interest, does not preclude the creditor from continuing and enforcing the policy for his own benefit⁶.

1 As to the first and second requirements see PARAS 539, 543 ante.

2 Life Assurance Act 1774 s 3; see PARA 536 text to note 4 ante. There is no requirement for a court to enter into any detailed examination of the values of insurable interests. It should confine itself to a consideration of whether the insurable interest had been insured in a manner or at a value which could be characterised as gaming or wagering at the time of the contract: *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807.

3 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch, overruling *Godsall v Boldero* (1807) 9 East 72; *Law v London Indisputable Life Policy Co* (1855) 1 K & J 223.

4 *Rhind v Wilkinson* (1810) 2 Taunt 237; *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 at 285, 290-291 per Roche J. As to what constitutes an interest see PARAS 539-541 ante.

5 *Dalby v India and London Life Assurance Co* (1854) 15 CB 365, Ex Ch. As to contracts of indemnity see PARA 661 post.

6 *Freme v Brade* (1858) 2 De G & J 582; followed in *Bruce v Garden* (1869) 5 Ch App 32. As to the creditor's position see further PARA 559 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(i) Rights apart from Statute/545. Assignability of life policies.

(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES

(i) Rights apart from Statute

545. Assignability of life policies.

The transfer of a policy of life insurance from the insured to another by manual delivery is effective, if so intended, to transfer the property in the document itself; but it does not of itself transfer the right to receive payment under the policy¹. The right to receive payment is a chose in action² and to entitle the transferee to payment it must be validly assigned³. At common law assignments of a chose in action, except to the Crown, were not recognised, but equity always took a more tolerant view and permitted the assignee to join the assignor as claimant or, if he refused, as defendant in an action⁴. These technical difficulties have now largely been removed by statute⁵.

¹ *Rummens v Hare* (1876) 1 Ex D 169, CA. As to mortgages of life policies see MORTGAGE vol 77 (2010) PARAS 233-236.

² *Re Moore, ex p Ibbetson* (1878) 8 ChD 519, CA.

³ *Crossley v City of Glasgow Life Assurance Co* (1876) 4 ChD 421; cf *Neale v Molineux* (1847) 2 Car & Kir 672; *Howes v Prudential Assurance Co and Howes* (1883) 48 LT 133.

⁴ *Dufaur v Professional Life Assurance Co* (1858) 25 Beav 599; *Re Turcan* (1888) 40 ChD 5 at 10 per Cotton LJ; and see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

⁵ As to assignment under statute see PARA 548 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(i) Rights apart from Statute/546. Form of equitable assignment.

546. Form of equitable assignment.

As between assignor and assignee, any form of assignment is sufficient to constitute an equitable assignment of a life policy¹, so long as it is clear that the object of the transaction is to transfer the benefit of the policy to the transferee². Unless there is consideration for the assignment or a valid declaration of trust, the assignor must have done everything to complete the gift, since equity will not help a volunteer to complete an imperfect gift³. To complete the assignee's title against the insurers or third parties, notice must be given to the insurers⁴. Normally the notice need not be in writing, so that an oral notice is sufficient⁵. By giving notice, the assignee acquires priority over any previous assignees who have not given notice⁶, unless he already has constructive notice of their rights⁷.

1 *Fortescue v Barnett* (1834) 3 My & K 36.

2 *Watson v McLean* (1858) EB & E 75, Ex Ch; *Pearson v Amicable Assurance Office* (1859) 27 Beav 229; *Chowne v Baylis* (1862) 31 Beav 351; *Re King, Sewell v King* (1879) 14 ChD 179; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA; see further CHOSSES IN ACTION vol 13 (2009) PARA 24 et seq.

3 *Pearson v Amicable Assurance Office* (1859) 27 Beav 229; *Fortescue v Barnett* (1834) 3 My & K 36.

4 *Gale v Lewis* (1846) 9 QB 730. It seems that it need not necessarily be the assignee who gives the notice: see CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

5 *North British Insurance Co v Hallett* (1861) 7 Jur NS 1263. As to the necessity for written notice in the case of an interest in trust property see CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

6 *Re Lake, ex p Cavendish* [1903] 1 KB 151.

7 *Spencer v Clarke* (1878) 9 ChD 137; *Newman v Newman* (1885) 28 ChD 674; *Re Weniger's Policy* [1910] 2 Ch 291. See CHOSSES IN ACTION vol 13 (2009) PARA 43.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(i) Rights apart from Statute/547. Transfer subject to equities.

547. Transfer subject to equities.

The effect of an equitable assignment is to transfer to the assignee the rights of the assignor¹; any bonuses or additions to the policy money² therefore pass to the assignee³. The assignee, however, takes subject to equities⁴. If, therefore, at the time of the assignment, the policy is voidable in the hands of the assignor, it is equally voidable in the hands of the assignee⁵. Further, the rights of the assignee are liable to be defeated by any subsequent breach of condition which would have rendered the policy voidable if it had remained in the hands of the assignor⁶. The policy may, however, contain a provision saving the rights of the assignee⁷; as a general rule, this provision operates for the benefit of bona fide assignees for value only⁸. An assignment of a life policy at an undervaluation by an insolvent assignor is capable of being overturned under the Insolvency Act 1986⁹.

1 These include the benefit of any variations in the terms of the policy: *Royal Exchange Assurance v Hope* [1928] Ch 179, CA.

2 As to bonuses see PARA 552 post.

3 *Courtney v Ferrers* (1827) 1 Sim 137; *Parkes v Bott* (1838) 9 Sim 388; cf *Roberts v Edwards* (1863) 33 Beav 259.

4 See generally CHOSER IN ACTION vol 13 (2009) PARA 1 et seq.

5 *Lefevre v Boyle* (1832) 3 B & Ad 877.

6 *Jackson v Forster* (1860) 1 E & E 470, Ex Ch; *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (cases of suicide by the insured). The assignor may enter into a covenant with the assignee not to do any act which will avoid the policy: *Vyse v Wakefield* (1840) 6 M & W 442.

7 The insured himself, even though the policy is effected upon the life of his debtor, is not entitled to the benefit of the provision: *Rowett, Leaky & Co Ltd v Scottish Provident Institution* (1926) 134 LT 660 (affd [1927] 1 Ch 55, CA); cf *Royal London Mutual Insurance Society v Barrett* [1928] Ch 411 (cases of suicide by the insured).

8 *Cook v Black* (1842) 1 Hare 390; *Moore v Woolsey* (1854) 4 E & B 243; *Dufaur v Professional Life Assurance Co* (1858) 25 Beav 599; *Jones v Consolidated Investment Assurance Co* (1858) 26 Beav 256; *Solicitors' and General Life Assurance Society v Lamb* (1864) 2 De GJ & Sm 251, followed in *City Bank v Sovereign Life Assurance Co* (1884) 50 LT 565; *White v British Empire Mutual Life Assurance Co* (1868) LR 7 Eq 394 (cases of suicide by the insured). It seems that an assignee for value before the suicide of the insured can enforce a policy even if the insured commits suicide while he is of sound mind if the policy contains an express promise to pay on sane suicide: *Moore v Woolsey* (1854) 4 E & B 243; *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 600, [1938] 2 All ER 602 at 607, HL, per Lord Atkin.

9 Ie the Insolvency Act 1986 s 339: *Re Thoars (deceased)*, *Reid v Ramlort Ltd* [2002] EWHC 2416 (Ch), [2002] All ER (D) 235 (Nov); and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 653-655.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(ii) Rights under Statute/548. Statutory rights of assignee to sue.

(ii) Rights under Statute

548. Statutory rights of assignee to sue.

Under the Policies of Assurance Act 1867 any person or corporation entitled by assignment or other derivative title to a policy of life assurance¹, and possessing at the time of action the right in equity to receive and give to the assurance company² liable an effectual discharge for the money insured or secured under the policy, may sue at law in his or its own name to recover the money³ after due written notice of the assignment has been given to the company concerned⁴. The Act does not affect the rights of the assignor and assignee as between themselves⁵, and it is still possible to have an assignment valid in equity, though not at law because the formalities required by the Act have not been complied with⁶. The only effect of the Act, therefore, is to enable the assignee to sue the insurers in his own name⁷. The Act does not give the assignee greater rights than those of the assignor and he remains subject to equities⁸.

1 'Policy of life assurance' or 'policy' means any instrument by which the payment of money by or out of the funds of an assurance company (see note 2 *infra*) on the happening of any contingency depending on the duration of human life is insured or secured: Policies of Assurance Act 1867 s 7. As to the exclusion of the policies issued by friendly societies see note 3 *infra*.

2 'Assurance company' means and includes every corporation, association, society or company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object or objects: *ibid* s 7.

3 *Ibid* s 1. This Act is not affected by the Law of Property Act 1925 s 136(1) (see PARA 550 *post*): s 136(2). The Policies of Assurance Act 1867 does not apply to any policy of insurance granted, or to any contract for payment on death entered into, in pursuance of the Government Annuities Act 1929 Pt II (ss 41-66 (as amended)) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1371 *et seq*), or the enactments replaced by that Part of that Act, or to any engagement for payment on death by any friendly society: Policies of Assurance Act 1867 s 8.

4 As to due notice see PARAS 549-550 *post*.

5 *Newman v Newman* (1885) 28 ChD 674.

6 Cf *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL; and see PARA 546 *ante*.

7 Before the enactment of the Policies of Assurance Act 1867, the assignee could not sue in his own name; cf *Re Turcan* (1888) 40 ChD 5, CA; and see PARA 545 *ante*.

8 *British Equitable Insurance Co v Great Western Ry Co* (1869) 38 LJCh 314; cf the Policies of Assurance Act 1867 s 2; and see PARA 547 *ante*.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(ii) Rights under Statute/549. Statutory conditions.

549. Statutory conditions.

The rights conferred by the Policies of Assurance Act 1867¹ will be acquired if the following conditions are fulfilled:

- 140 (1) the assignment is such as would, apart from the Act, constitute a good equitable assignment²; and
- 141 (2) the assignment is in writing, either by indorsement upon the policy or by separate instrument³.

Before the assignee, or his personal representatives or assigns, can sue under the Act, written notice of the date and purport of the assignment must be given to the insurers at their principal place of business or, if they have two or more, at some one of them, in England, Scotland or Northern Ireland⁴. The policy must specify the place or places at which notices of assignment may be given⁵. The insurers are bound, upon request, to give a written acknowledgment of the receipt of notice; and this acknowledgment is conclusive evidence against the insurers that notice has been given⁶. The date on which the notice is received regulates the priorities of all claims under any assignment⁷; but, notwithstanding this provision, a subsequent assignee does not by giving notice first obtain priority over a previous assignment of which he has notice⁸. A payment made in good faith by the insurers in respect of any policy before the date when notice of an assignment is received is valid as against the assignee giving such notice⁹.

1 See the Policies of Assurance Act 1867 s 1; and PARA 548 ante.

2 Ibid s 1; *Crossley v City of Glasgow Life Assurance Co* (1876) 4 ChD 421; *Spencer v Clarke* (1878) 9 ChD 137; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA. As to equitable assignments see PARAS 546-547 ante.

3 Policies of Assurance Act 1867 s 5. To be valid the assignment must be in the words or to the effect of the statutory form provided: s 5. The form is 'I, A B of, etc, in consideration of, etc, do hereby assign unto C D of, etc, his executors, administrators and assigns, the [within] policy of assurance granted, etc [*here describe the policy*]. In witness, etc': s 5, Schedule.

4 Ibid s 3; Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405.

5 Policies of Assurance Act 1867 s 4.

6 Ibid s 6. A fee of not more than 25p may be charged: s 6 (amended by the Decimal Currency Act 1969 s 10(1)). As to the application of the Policies of Assurance Act 1867 s 6 (as amended) see the text and note 4 supra.

7 Ibid s 3. As to priority see CHOSER IN ACTION vol 13 (2009) PARA 43 et seq.

8 *Newman v Newman* (1885) 28 ChD 674.

9 Policies of Assurance Act 1867 s 3.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(ii) Rights under Statute/550. Absolute assignments.

550. Absolute assignments.

Apart from the rights under the Policies of Assurance Act 1867¹, an assignee of a life policy has the right to sue in his own name, and the other rights conferred by the general statutory provisions relating to the legal assignment of choses in action², provided that (1) there is an absolute assignment in writing under the hand of the assignor, not purporting to be by way of charge only; and (2) express notice in writing to the insurers has been given³. The effective date of the notice is the date on which it is received by or on behalf of the insurers⁴. The operation of the assignment is subject to equities having priority over the right of the assignee⁵. An assignment may be absolute notwithstanding that it is by way of mortgage subject to a right of redemption⁶, or that the assignee is a trustee of the proceeds⁷. A voluntary assignment is covered equally with an assignment for value⁸.

1 As to such rights see PARAS 548-549 ante.

2 I.e. those conferred by the Law of Property Act 1925 s 136(1): see CHOSSES IN ACTION vol 13 (2009) PARA 72 et seq.

3 See *ibid* s 136(1).

4 See *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; and CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

5 See the Law of Property Act 1925 s 136(1) proviso; *West of England Bank v Batchelor* (1882) 51 LJCh 199 at 200; and CHOSSES IN ACTION vol 13 (2009) PARAS 60 et seq, 72 et seq.

6 *Tancred v Delagoa Bay and East Africa Rly Co* (1889) 23 QBD 239; *Durham Bros v Robertson* [1898] 1 QB 765, CA.

7 *Comfort v Betts* [1891] 1 QB 737, CA. See further CHOSSES IN ACTION vol 13 (2009) PARA 76.

8 *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104; and see CHOSSES IN ACTION vol 13 (2009) PARA 76 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(2) ASSIGNMENT OF LONG TERM INSURANCE POLICIES/(ii) Rights under Statute/551. Condition against assignment.

551. Condition against assignment.

A condition prohibiting assignment will be construed strictly. Thus, a policy which is rendered unassignable at law may still be capable of assignment in equity by declaration of trust¹.

1 *Re Turcan* (1888) 40 ChD 5, CA. See CHOSER IN ACTION vol 13 (2009) PARA 101.

UPDATE

551 Condition against assignment

NOTE 1--See *Freakley v Centre Reinsurance International Co* [2004] EWHC 2740 (Ch), [2005] Lloyd's Rep IR 264 (prohibition of assignment of rights in policy did not affect entitlement to deal with recoveries resulting from an exercise of those rights).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(i) The Amount Payable/552. Bonus and share of profits.

(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES

(i) The Amount Payable

552. Bonus and share of profits.

The amount payable under the policy is not necessarily limited to the sum insured. Many policies provide for the increase of the sum insured by the addition of bonuses, which accrue after the policy has been in force for a specified period¹, or by giving the insured a share in the profits of the insurers' business².

Where a policy has been effected in another country the place of payment is governed by the proper law of the contract³.

1 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 665 per Channell J.

2 The distribution of profits is usually in the discretion of the insurers: *Baerlein v Dickson* (1909) 25 TLR 585; *British Equitable Assurance Co Ltd v Baily* [1906] AC 35, HL; *Scragg v United Kingdom Temperance and General Provident Institution* [1976] 2 Lloyd's Rep 227 (sum payable under policy limited if death caused directly or indirectly by motor racing).

3 *Pick v Manufacturers Life Insurance Co* [1958] 2 Lloyd's Rep 93: see CONFLICT OF LAWS.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(i) The Amount Payable/553. Surrender value.

553. Surrender value.

The value of a current policy depends upon the life expectation of the life insured, and the value, though only nominal at the commencement of the risk, usually increases according to the length of the period during which the policy has remained in force¹. If, therefore, the policy is allowed to lapse², its value will be lost to the insured³. To obviate this, provision may be made by which the insured becomes entitled on notice⁴ to surrender the policy and to be paid its surrender value⁵. In lieu of being paid the surrender value, the insured may be given the option of taking a fully paid policy for a reduced amount proportionate to the number of premiums actually paid⁶.

1 This will be correct as regards the early years of the insurance, but if the insured lives beyond the average period of life upon which the premiums are based, he will have made a bad bargain: *Prudential Insurance Co Ltd v IRC* [1904] 2 KB 658 at 665 per Channell J.

2 As to lapse and revival of policies see PARA 168 ante.

3 For statutory provisions as to free policies and surrender values in relation to contracts of industrial assurance see INDUSTRIAL ASSURANCE.

4 Once the notice has become effective the surrender value only will be payable, even though the insured dies before the actual surrender of the policy or the payment of the surrender value: *Ingram-Johnson v Century Insurance Co* 1909 SC 1032.

5 *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587, PC.

6 As to the exercise of the option by a husband where the policy is effected for the benefit of his wife (as to which see PARA 538 ante) see *Re Policy of the Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(i) The Amount Payable/554. Interest.

554. Interest.

The amount payable under the policy does not carry interest as a matter of course from the time when it becomes due¹, but interest may be awarded as damages for the wrongful detention of money which ought to have been paid².

1 *Higgins v Sargent* (1823) 2 B & C 348.

2 As to when interest will be so awarded see PARA 193 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(i) The Amount Payable/555. Payment in foreign currency.

555. Payment in foreign currency.

Where the policy provides for payment in a foreign currency, the amount payable, for the purposes of conversion into sterling, is calculated at the rate of exchange on the day when the amount became due¹.

¹ *Anderson v Equitable Life Assurance Society of the United States* (1926) 134 LT 557, CA; *Buerger v New York Life Assurance Co* (1927) 43 TLR 601, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1299-1302.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(ii) Persons entitled to Payment/556. Insurance on life of insured.

(ii) Persons entitled to Payment

556. Insurance on life of insured.

Where the life insured is that of the insured himself, the person entitled to payment is the owner of the legal chose in action, that is to say, the insured's personal representatives¹, legal assignee² or trustee in bankruptcy³, as the case may be⁴. However, if the premiums for the policy were funded by the insured from sums held on trust by him for other purposes, the proceeds of the policy are impressed with a trust for the equitable owners of those funds⁵.

1 If the insured is a person domiciled abroad, the insurers may pay his representatives without a grant of representation in the United Kingdom: Revenue Act 1884 s 11 proviso (amended by the Revenue Act 1889 s 19). In relation to estate duty the insurers or representatives are entitled to retain sufficient out of the policy money to cover any duty payable: *Haas v Atlas Assurance Co Ltd* [1913] 2 KB 209. As to the replacement of estate duty by inheritance tax see INHERITANCE TAXATION vol 24 (Reissue) PARAS 401-403.

2 *Ottley v Gray* (1847) 16 LJCh 512; *Desborough v Harris* (1855) 5 De GM & G 439.

3 *Jackson v Forster* (1860) 1 E & E 470 at 471, Ex Ch, per Cockburn CJ.

4 For the statutory provisions as to the persons to whom payment may be made on the death intestate of a member of a registered friendly society without having made a nomination see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2239. As to the position where policy money is expressed to be payable to a third party see PARA 557 post.

5 *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(ii) Persons entitled to Payment/557. Position of third party.

557. Position of third party.

The policy money payable on the death of the insured may be expressed to be payable to a third party and the third party is then prima facie merely the agent for the time being of the legal owner¹ and has his authority to receive the policy money and to give a good discharge; but he generally has no right to sue the insurers in his own name². The question has been raised whether the third party's authority to receive the policy money is terminated by the death of the insured; it seems, however, that unless and until they are otherwise directed by the insured's personal representatives the insurers may pay the money to the third party and get a good discharge from him³. The nomination of a third party as beneficiary under a policy may constitute that person as a trustee where the insured intended that the policy monies be applied for the benefit of another person other than the third party⁴.

By taking out a policy expressed to be for the benefit of a third party, the insured does not thereby necessarily constitute himself a trustee⁵. In each case it is a question of construction of the terms of the policy or relevant deed whether or not such a trust is created⁶. There is, in any case, nothing in common law to prohibit a contract between two persons under which one party is obliged to confer a benefit on a third party not privy to the contract, and where a contract is of that type, there is no principle of equity compelling the obligor to make payment to anyone else, for example the trustee in bankruptcy of the other party to the contract⁷.

1 *Re Policy No 6402 of Scottish Equitable Life Assurance Society* [1902] 1 Ch 282; cf *Re Slattery* [1917] 2 IR 278.

2 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA; *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124. For the power of a member of a registered friendly society to dispose by nomination of sums payable on his death and the right of the nominee to payment on the death of the nominator see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2230. As to the effect of a provision in the rules of an unregistered friendly society for payment of death benefit to relatives of a member see INDUSTRIAL ASSURANCE vol 24 (Reissue) PARA 235. As to policies in favour of the wife or husband or children of the insured see PARA 558 post.

3 *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124.

4 *Gold v Hill* [1999] 1 FLR 54, [1998] Fam Law 664.

5 *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321 (see PARA 565 note 3 post); *Re Gordon, Lloyds Bank and Parratt v Lloyd and Gordon* [1940] Ch 851 (construction of rules of benefit society). In both these cases it was held that a trust was created. Cases in which it was held that no trust was created are *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348; *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124; *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *Re Independent Air Travel Ltd* [1961] 1 Lloyd's Rep 604; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222.

6 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 157, CA, per Fry LJ. Unless the right is expressly reserved, a company may not validly change the beneficial interests under a company superannuation scheme so as to confer a benefit on a third party without the consent of the employees who are parties to the scheme: *Re Alfred Herbert Ltd Pension and Life Assurance Scheme Trusts, Alfred Herbert Ltd v Hancocks* [1960] 1 All ER 618, [1960] 1 WLR 271.

7 *Re Schebsman, ex p Official Receiver, Trustee v Cargo Superintendent (London) Ltd and Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA; see also *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; *Green v Russell (McCarthy, third party)* [1959] 2 QB 226, [1959] 2 All ER 525, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(ii) Persons entitled to Payment/558. Policies in favour of spouse or children.

558. Policies in favour of spouse or children.

A policy effected by a man on his life and expressed to be for the benefit of his wife or children, or by a woman on her life and expressed to be for the benefit of her husband or children, creates a trust in favour of the objects named in the policy and the money payable under the policy does not, so long as any object of the trust remains unperformed, form part of the insured's estate. Provision is made for the appointment of trustees of the money payable under such a policy; and the receipt of a trustee or trustees duly appointed, or in default of any such appointment or of notice of such appointment to the insurers the receipt of the insured's personal representatives, is a discharge to the insurers for the sum insured¹.

¹ Married Women's Property Act 1882 s 11 (amended by the Law Reform (Married Women and Tortfeasors) Act 1935 ss 5(1), (2), 8(2); Statute Law (Repeals) Act 1967). As to the application of the statutory provision to an endowment policy see PARA 565 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(ii) Persons entitled to Payment/559. Insurance on life of third party.

559. Insurance on life of third party.

Where the life insured is not that of the insured, the insured is the person *prima facie* entitled to payment. In the absence of some agreement to that effect, the policy does not enure to the benefit of the estate of the life insured¹. Thus, if a creditor insures the life of the debtor, payment of the debt does not in itself give any rights over the policy to the debtor; the insured effected the policy for his own protection and accordingly remains entitled to its benefit². However, there may be an express agreement between the parties that the policy is to become the property of the debtor when the debt is paid; and a similar agreement is to be implied where by arrangement between the parties the creditor is to effect the policy on the life of the debtor and the debtor is to pay the premiums³.

1 *Freme v Brade* (1858) 2 De G & J 582; *Worthington v Curtis* (1875) 1 ChD 419, CA; cf *Henson v Blackwell* (1845) 4 Hare 434; *Hatley v Liverpool Victoria Legal Friendly Society* (1918) 88 LJKB 237; *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348.

2 *Freme v Brade* (1858) 2 De G & J 582; *Bruce v Garden* (1869) 5 Ch App 32; *Knox v Turner* (1870) 5 Ch App 515; *Preston v Neele* (1879) 12 ChD 760; see also *Brown v Freeman* (1851) 4 De G & Sm 444; *Lewis v King* (1875) 44 LJCh 259.

3 *Salt v Marquess of Northampton* [1892] AC 1, HL; see also *Holland v Smith* (1806) 6 Esp 11; *Lea v Hinton* (1854) 5 De GM & G 823; *Drysdale v Piggott* (1856) 8 De GM & G 546; *Courtenay v Wright* (1860) 2 Giff 337. The fact that the debtor, though charged with the premiums, has never repaid them to the creditor is immaterial: *Morland v Isaac* (1855) 20 Beav 389; cf *Triston v Hardey* (1851) 14 Beav 232.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(ii) Persons entitled to Payment/560. Lien on policy.

560. Lien on policy.

A voluntary payment of premiums upon a life policy does not give any lien or interest in the policy to the person making the payment¹. However, in addition to the ordinary possessory lien², there are certain cases in which a lien may be acquired by payment of the premium. Instances in which such cases have arisen are the following³:

- 142 (1) by contract with the beneficial owner of the policy⁴;
- 143 (2) by reason of the right of a trustee to an indemnity out of the trust property for money expended by him for its preservation⁵;
- 144 (3) by the subrogation of some person, who at a trustee's request has advanced money for the preservation of trust property, to the right of the trustee⁶;
- 145 (4) by reason of the right of a mortgagee, or other person having a charge on the policy, to add to his security any money paid by him to preserve the property charged⁷;
- 146 (5) where a married woman has paid, out of her own property, the premiums on a policy effected under her marriage settlement or at her husband's request on a policy effected in their joint names⁸;
- 147 (6) where an assignee, after assignment of the policy to him, has paid premiums although, in fact, a prior interest in the policy has been created⁹;
- 148 (7) where the premium has been paid in the mistaken belief of all parties that the person paying them was the owner of the policy¹⁰.

Where, however, a bankrupt pays premiums on a life policy after his bankruptcy, no lien arises in his favour against the trustee in bankruptcy¹¹.

1 *Burridge v Row* (1844) 13 LJCh 173; *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; *Re Waugh's Trusts* (1877) 46 LJCh 629; *Re Jones' Settlement, Stunt v Jones* [1915] 1 Ch 373. Payments made with the knowledge of the trustee in bankruptcy of the insured must be allowed: *Re Tyler, ex p Official Receiver* [1907] 1 KB 865, CA; cf *Tapster v Ward* (1909) 101 LT 503, CA; and see the text to note 11 infra.

2 *Head v Egerton* (1734) 3 P Wms 280; *West of England Bank v Batchelor* (1882) 51 LJCh 199.

3 The first four instances listed in the text are taken from *Re Leslie, Leslie v French* (1883) 23 ChD 552. This list is not, however, exhaustive: see *Strutt v Tippet* (1889) 62 LT 475 at 477, CA, per Lindley LJ; *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610.

4 *Re Leslie, Leslie v French* (1883) 23 ChD 552; and see *Richards v Platel* (1841) Cr & Ph 79; *Earl Fitzwilliam v Price* (1858) 31 LTOS 389; *West of England Bank v Batchelor* (1882) 52 LJCh 199; *Re Walker, Meredith v Walker* (1893) 68 LT 517; *Re McKerrell, McKerrell v Gowans* [1912] 2 Ch 648.

5 *Re Leslie, Leslie v French* (1883) 23 ChD 552; and see *Clack v Holland* (1854) 19 Beav 262; *Re Smith's Estate, Bilham v Smith* [1937] Ch 636, [1937] 3 All ER 472; cf *Re Earl of Winchelsea's Policy Trusts* (1888) 39 ChD 168. Where, however, the relationship of parent and child or husband and wife exists between the trustee and the beneficiary, payments made by the trustee are prima facie for the advancement and benefit of the beneficiary and cannot be recovered: *Re Roberts, Public Trustee v Roberts* [1946] Ch 1.

6 *Re Leslie, Leslie v French* (1883) 23 ChD 552; and see *Clack v Holland* (1854) 19 Beav 262. A trustee of a policy who makes or obtains advances to pay the premiums under the policy cannot, however, either obtain or create a lien if he is, or in the proper performance of his trust ought to be, in possession of funds applicable for the purpose: *Clack v Holland* supra; *Re Regent's Canal Ironworks Co, ex p Grissell* (1875) 3 ChD 411, CA.

7 *Re Leslie, Leslie v French* (1883) 23 ChD 552; and see *Gill v Downing* (1874) LR 17 Eq 316; *Shaw v Scottish Widows' Fund Assurance Society* (1917) 87 LJCh 76; *Re City of Glasgow Life Assurance Co, Clare's Policy* (1914) 84 LJCh 684.

8 *Burridge v Row* (1844) 13 LJCh 173; *Re McKerrell, McKerrell v Gowans* [1912] 2 Ch 648. No lien arises, however, where the wife voluntarily pays premiums on a policy on her husband's life subject to a settlement under which she takes first life interest: *Re Jones' Settlement, Stunt v Jones* [1915] 1 Ch 373.

9 *West v Reid* (1843) 2 Hare 249; *Gill v Downing* (1874) LR 17 Eq 316.

10 *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610.

11 *Tapster v Ward* (1909) 101 LT 503, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(iii) Payment into Court/561. Statutory right to pay into court.

(iii) Payment into Court

561. Statutory right to pay into court.

Subject to rules of court¹, any life assurance company² may pay into the Supreme Court any money payable by it under a life policy³ in respect of which, in the opinion of the board of directors, no sufficient discharge can otherwise be obtained⁴. The receipt of the proper officer is a sufficient discharge to the company for the money so paid into court and, subject to rules of court, the money must be dealt with according to the orders of the Supreme Court⁵.

1 For the rules of court relating to payment into court by life assurance companies see PARA 562 post.

2 'Life assurance company' means any corporation, company or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies: Life Assurance Companies (Payment into Court) Act 1896 s 2. For the Acts relating to friendly societies see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081.

3 'Life policy' includes any policy not foreign to the business of life assurance: *ibid* s 2.

4 *Ibid* s 3 (amended by the Administration of Justice Act 1965 s 17(1), Sch 1; and the Courts Act 1971 s 56(4), Sch 11 Pt II).

5 Life Assurance Companies (Payment into Court) Act 1896 s 4 (amended by the Administration of Justice Act 1965 Sch 1; and the Courts Act 1971 Sch 11 Pt II).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(3) PAYMENT UNDER LONG TERM INSURANCE POLICIES/(iii) Payment into Court/562. Exercise of right.

562. Exercise of right.

A company wishing to make a payment into court under the Life Assurance Companies (Payment into Court) Act 1896¹ must file an application notice setting out:

- 149 (1) a short description of the policy under which money is payable²;
- 150 (2) a statement of the persons entitled under the policy, including their names and addresses so far as known to the company³;
- 151 (3) a short statement of the notices received by the company making any claim to the money assured or withdrawing any such claim, with the dates of receipt of such notices and the names and addresses of the persons by whom they were given⁴;
- 152 (4) a statement that, in the opinion of the board of directors of the company, no sufficient discharge can be obtained for the money which is payable other than by paying it into court under the Act⁵;
- 153 (5) a statement that the company agrees to comply with any order or direction the court may make to pay any further sum into court or to pay any costs⁶;
- 154 (6) an undertaking by the company immediately to send to the Accountant General at the Court Funds Office any notice of claim received by the company after the application notice has been filed, together with a letter referring to the Court Funds Office reference number⁷; and
- 155 (7) the company's address for service⁸.

The company must not deduct from the money payable by it under the policy any costs of the payment into court, except for any court fee⁹. If the company is a party to any proceedings issued in relation to the policy or the money assured by it, it may not make a payment into court under the Act without the permission of the court in those proceedings¹⁰. Unless the court orders otherwise, where a company pays money into court under the Act it must immediately serve notice of the payment on every person who is entitled under the policy or has made a claim to the money assured¹¹.

Any payment out of money which has been paid into court under the Act may only be made with the court's permission. Permission may be obtained by making an application stating the grounds on which the order for payment out is sought. Evidence of any facts on which the applicant relies may also be necessary¹². The application must be served on every person stated in the written evidence of the company which made the payment to be entitled to or to have an interest in the money, any other person who has given notice of a claim to the money and, if an application is being made for costs against it, the company which made the payment¹³.

If a company acts unreasonably in paying into court, it runs the risk of paying the costs to which the person entitled is put by reason of the payment¹⁴. The company may have recourse to the statutory power to pay into court where the policy has been lost¹⁵.

¹ See PARA 561 ante.

² Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(1).

³ Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(2).

- 4 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(3).
- 5 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(4).
- 6 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(5).
- 7 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(6).
- 8 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.1(7). The witness statement required must be filed at Chancery Chambers at the Royal Courts of Justice, or a Chancery district registry of the High Court: para 7.2.
- 9 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.3.
- 10 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.4.
- 11 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 7.5.
- 12 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 paras 4.2, 8.1.
- 13 Practice Direction--Miscellaneous Provisions about Payments into Court PD 37 para 8.2.
- 14 *Harrison v Alliance Assurance Co* [1903] 1 KB 184, CA.
- 15 *Harrison v Alliance Assurance Co* [1903] 1 KB 184, CA. Before the enactment of the Life Assurance Companies (Payment into Court) Act 1896 it had been held, in the case of conflicting claims, that if the insurers could be regarded as trustees, they could pay the policy money into court under the Trustee Relief Acts then in force (*Re Hall* (1861) 5 LT 395; *Re United Kingdom Life Assurance Co* (1865) 34 Beav 493; *Re Webb's Policy* (1866) LR 2 Eq 456; *Re Rosier's Trusts* (1877) 37 LT 426); but, if they were not in the position of trustees, they could not do so (*Re Haycock's Policy* (1876) 1 ChD 611; *Matthew v Northern Assurance Co* (1878) 9 ChD 80), and their only remedy was to interplead (*Prudential Assurance Co v Thomas* (1867) 3 Ch App 74). As to interpleader see CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(4) ENDOWMENT INSURANCE/563. Basic features of endowment insurance.

(4) ENDOWMENT INSURANCE

563. Basic features of endowment insurance.

The essence of a contract by way of endowment insurance is that a specified sum becomes payable, not on the death of the insured, but on the arrival of a specified date, the insured being still alive; the contingency is the duration of life up to the specified date rather than the arrival of death¹. There may be subsidiary provisions providing that, in the event of death before the specified date, a proportion of the specified sum is payable² or a return of premiums will be made in whole or in part³. Usually there is an amalgamation of endowment and strict life insurance in the same policy, so as to make the specified sum payable either on the specified date or on death before that date⁴.

1 *Prudential Assurance Co v IRC* [1904] 2 KB 658; *Joseph v Law Integrity Insurance Co Ltd* [1912] 2 Ch 581, CA; *Gould v Curtis* [1913] 3 KB 84, CA.

2 *Prudential Assurance Co v IRC* [1904] 2 KB 658; *Gould v Curtis* [1913] 3 KB 84, CA.

3 *Joseph v Law Integrity Insurance Co Ltd* [1912] 2 Ch 581, CA.

4 *Gould v Curtis* [1913] 3 KB 84 at 91, CA, per Cozens-Hardy MR, citing Bunyon's Law of Life Assurance (4th Edn) 1. As to damages for loss of pension rights suffered by reason of wrongful dismissal see *Acklam v Sentinel Insurance Co Ltd* [1959] 2 Lloyd's Rep 683; and EMPLOYMENT vol 40 (2009) PARA 774.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(4) ENDOWMENT INSURANCE/564. Endowment insurance as species of life insurance.

564. Endowment insurance as species of life insurance.

Although endowment insurance is not life insurance in the strict sense¹ it is within the broad meaning of the term². The general principles applicable to life insurance which have been previously set out³ are, therefore, equally applicable to endowment insurance. In particular, endowment insurance ranks as life insurance for the purposes of the statutory restrictions on the carrying on of life insurance business⁴, and a policy of combined endowment insurance and life insurance ranks as life insurance for the purpose of the provisions relating to income tax relief in respect of life insurance premiums⁵.

1 For the meaning of life insurance in the strict sense see PARA 525 ante.

2 For the broad meaning of life insurance see PARA 527 ante.

3 As to these general principles see PARA 525 et seq ante.

4 As to such restrictions see PARA 22 ante.

5 As to the extent of relief in such a case and as to relief in respect of premiums paid for retirement annuities see INCOME TAXATION vol 23(2) (Reissue) PARA 1000 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(4) ENDOWMENT INSURANCE/565. Endowment policy for child or wife.

565. Endowment policy for child or wife.

Considerable difficulties have arisen in the case of child's endowment policies or deferred life insurance policies taken out by a parent, because normally a person has no insurable interest in the life of his child¹ and such a policy would therefore be illegal if it were regarded as enuring for the benefit of the proposer². It seems that, at any rate where the policy is in the form now commonly current, the proposer will be regarded as holding the policy in trust for the child³; if after attaining the age of 18⁴ the child makes the appropriate payments of premium, this might well operate as a novation by which he was accepted as the insured⁵.

Where a husband takes out an endowment policy expressed to be for the benefit of his wife, the statutory provisions relating to policies effected by husbands and wives for one another's benefit⁶ apply⁷.

1 As to insurable interests in the lives of relatives see PARA 541 ante.

2 As to insurances on the life of a child under ten by friendly societies and industrial insurance companies see PARA 541 text and note 11 ante.

3 See *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321 (policy taken out by father and expressed to be on behalf of and for benefit of child; sum insured to be paid to personal representatives of child on his death at or over 21; power to father to surrender, assign or charge policy before child attained 21; on twenty-first birthday of child, rights of father to cease and child to be solely interested subject to any subsisting assignment or charge; provision for partial recovery of premiums if child died under 21; if father died before child attained 21, policy to remain in force until, but not including, child's twenty-first birthday; father died while child a minor; policy held by father at his death, and thereafter by trustee of his will, in trust for child). In that case, *Re Engelbach's Estate, Tibbets v Engelbach* [1924] 2 Ch 348, and *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124, were distinguished. See also *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; *Gee v Gee* [1973] 5 WWR 268 (Sask). As to policies expressed to be for the benefit of third parties see PARA 557 ante.

4 As to the reduction of the age of majority from 21 to 18 see the Family Law Reform Act 1969 s 1(1), (2)(a); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

5 Compare the position in Scots law as laid down in the House of Lords in *Carmichael v Carmichael's Executrix* 1920 SC (HL) 195.

6 As to policies effected by spouses see PARA 558 ante.

7 *Re Ioakimidis' Policy Trusts, Ioakimidis v Hartcup* [1925] Ch 403; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 274.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/5. LONG TERM INSURANCE/(4) ENDOWMENT INSURANCE/566. Alienation of benefits under policy.

566. Alienation of benefits under policy.

If income tax relief is to be obtained for premiums for a contract of retirement annuity insurance, the contract must include a provision securing that no annuity payable under it will be capable in whole or in part of surrender, commutation or assignment¹. However, it is permissible, where there is a minimum term for the annuity, for the insured to bequeath by will any sum which may become payable by reason of his death before the expiration of the minimum term, and also for the personal representatives of the insured to assign any such sum, either to give effect to a testamentary disposition or to the rights of those entitled on intestacy, or in appropriation towards any legacy or share or interest in the estate².

1 See the Income and Corporation Taxes Act 1988 s 620(2), (3).

2 See *ibid* s 620(4); and INCOME TAXATION.

UPDATE

566 Alienation of benefits under policy

TEXT AND NOTES--Provisions of Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 873B.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(i) In general/567. Relation of accident insurance to life insurance.

6. ACCIDENT AND SICKNESS INSURANCE

(1) ACCIDENT INSURANCE

(i) In general

567. Relation of accident insurance to life insurance.

The object of accident insurance is to make provision for payment of a sum of money¹ in the event of the insured sustaining accidental injury². It resembles life insurance³ (and differs from other types of insurance) in that it is not a contract of indemnity⁴; it is merely a contract to pay a sum of money on the happening of a specified event⁵, namely the sustaining by the insured of personal injury by such accidental means as may be defined in the policy⁶. The event may involve the death of the insured, but the insurance is not for that reason a contract of life insurance⁷. In the case of life insurance the insured is bound to die some day but there is uncertainty as to the date when the death will occur⁸; in the case of accident insurance it may be that no accident will ever happen; and, even if it does, there is no certainty that it will result in death or disablement to the insured⁹.

1 The policy usually makes provision for the payment of different sums varying in amount according to the nature of the injuries sustained by the insured: see PARA 580 post. As to the national system of insurance against industrial injuries see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 126 et seq.

2 Accident insurance is a 'contract of general insurance' under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt 1: see PARA 21 ante.

3 As to life insurance see PARA 525 et seq ante.

4 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45 at 53 per Alderson B. A policy insuring the insured against loss arising from any accident to a third person is, however, a contract of indemnity: *Blascheck v Bussell* (1916) 33 TLR 51; affd 33 TLR 74, CA.

5 *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1 at 2 per Bramwell B.

6 *Lloyds Bank Ltd v Eagle Star Insurance Co Ltd* [1951] 1 All ER 914 (insurance against personal injuries included personal injuries resulting in death).

7 *General Accident Assurance Corp'n v IRC* (1906) 8 F 477, Ct of Sess; and see note 6 supra.

8 See PARA 525 ante.

9 *General Accident Assurance Corp'n v IRC* (1906) 8 F 477, Ct of Sess; cf *Lancashire Insurance Co v IRC* [1899] 1 QB 353 at 359 per Bruce J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(i) In general/568. Need for insurable interest.

568. Need for insurable interest.

As in life insurance, an insurable interest is required by statute¹, the interest normally being the potential pecuniary loss of the insured as a result of the disablement, either of himself or of the third party if a third party is insured. In fact, accident insurance developed out of life insurance, but it must now be regarded as a different kind of insurance, and it is in practice generally so regarded².

¹ See the Life Assurance Act 1774 s 1; *Shilling v Accidental Death Insurance Co* (1857) 2 H & N 42; *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807; and PARA 536 ante.

² The distinction is recognised in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (as amended), where life insurance is a 'contract of long term insurance' whereas accident insurance is a 'contract of general insurance': see Sch 1 Pt I, Pt II; and PARAS 21, 567 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/569. Meaning of 'accident'.

(ii) Policies Insuring Against Accidental Injury

569. Meaning of 'accident'.

The event insured against may be indicated in the policy solely by reference to the phrase 'injury by accident' or the equivalent phrase 'accidental injury', or it may be indicated as 'injury caused by or resulting from an accident'. The word 'accident', or its adjective 'accidental', is no doubt used with the intention of excluding the operation of natural causes such as old age, congenital or insidious disease or the natural progression of some constitutional physical or mental defect; but the ambit of what is included by the word is not entirely clear¹. It has been said that what is postulated is the intervention of some cause which is brought into operation by chance so as to be fairly describable as fortuitous². The idea of something haphazard is not necessarily inherent in the word; it covers any unlooked for mishap or an untoward event which is not expected or designed³, or any unexpected personal injury resulting from any unlooked for mishap or occurrence⁴. The test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence, it being irrelevant that a person with expert knowledge, for example of medicine, would have regarded it as inevitable⁵. The standpoint is that of the victim, so that even wilful murder may be accidental as far as the victim is concerned⁶.

1 The statement of the law contained in the text and in PARAS 571-575 post is founded substantially on cases which were decided under the Workmen's Compensation Acts (which are repealed), although the insurance cases are also included. In *Trim Joint District School Board of Management v Kelly* [1914] AC 667 at 675-676, HL, it was said by Lord Haldane LC that the fundamental conception of the Workmen's Compensation Act 1906 (repealed) is that of insurance in the true sense. He added, however, at 677, that 'the construction of the Act ought to be more liberal than would be the case if the Act were construed with the closeness which distinguishes the construction of words in a contract such as that of insurance'. See also *Fenton v Thorley & Co Ltd* [1903] AC 443 at 454-455, HL, per Lord Lindley, stressing the effect of the rule that the accident must be the proximate cause of the injury in insurance cases; and PARA 584 post. The workmen's compensation cases must be used with some caution: *De Souza v Home and Overseas Insurance Ltd* (1990) Times, 19 September, CA, per Mustill LJ; but it is thought that in general they afford a guide to the meaning of 'accident'. There was never a sufficiency of pure insurance cases to give rise to the intensive examination of the phrase 'injury by accident', in a multiplicity of different factual contexts, which became necessary in the course of the voluminous workmen's compensation litigation. Nor has there in recent years been quite such stringency as once prevailed in construing insurance policies; the trend is, if anything, to adopt a liberal interpretation in favour of the insured, so far as the ordinary and natural meaning of the words used by the insurers permits this to be done. For the principle that words must be given their ordinary and natural meaning see PARA 85 ante. The expression 'injury caused ... by accident' is also used in the Social Security Contributions and Benefits Act 1992 s 94(1) (replacing earlier industrial injuries legislation): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 127. As to the meaning of 'accident' in the context of air carriers' liability to passengers see CARRIAGE AND CARRIERS vol 7 (2008) PARA 150.

2 *Sinclair v Maritime Passengers' Assurance Co* (1861) 3 E & E 478 at 485 per Cockburn CJ; *Reynolds v Accidental Insurance Co* (1870) 22 LT 820 at 821 per Willes J; *Re Scarr and General Accident Assurance Corp* [1905] 1 KB 387 at 393 per Bray J; see also *De Souza v Home and Overseas Insurance Ltd* (1990) Times, 19 September, CA; *Dhak v Insurance Co of North America (UK) Ltd* [1996] 2 All ER 609, [1996] 1 WLR 936, CA.

3 *Fenton v Thorley & Co Ltd* [1903] AC 443 at 448, HL, per Lord Macnaghten; *Mills v Smith (Sinclair, third party)* [1964] 1 QB 30, [1963] 2 All ER 1078.

4 *Fenton v Thorley & Co Ltd* [1903] AC 443 at 451, HL, per Lord Shand, and at 453 per Lord Lindley; *Mills v Smith (Sinclair, third party)* [1964] 1 QB 30, [1963] 2 All ER 1078; *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111 (death of insured driving after consuming an excess of alcohol was nonetheless 'accidental', but insurers avoided liability on other grounds).

5 *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242, HL.

6 See *Trim Joint District School Board of Management v Kelly* [1914] AC 667, HL; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 1 All ER 949, CA; and note 1 *supra*.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/570. Cases where there is an accident.

570. Cases where there is an accident.

A distinction has been drawn between the word 'accident' and the phrase 'an accident'¹. The right to recover under a policy insuring against injury by accident is not necessarily confined to a case where injury results from circumstances which can be separately visualised and described as an accident². However, where there is 'an accident', in the sense of an antecedent mishap from which injury results, the policy will plainly apply. For example, where the insured by misadventure goes in front of a train and is run over³, falls into a stream and is drowned⁴, slips on a step⁵, is thrown from a horse⁶, is suffocated by smoke from a burning house⁷ or is drowned while bathing⁸, the insured is entitled to recover under the policy, subject to any exception in the policy by which liability in respect of the particular misadventure in question is excluded⁹. Similarly, there is 'an accident' if injury or death is caused by indiscriminate stone throwing¹⁰, by an anaesthetic administered for the purposes of a surgical operation¹¹, by an infection through a break in the skin¹², by the inhalation of tuberculosis germs, even though each of the many occasions could not be identified¹³, or by each successive blow caused by the vibration of a machine until Raynaud's disease was set up¹⁴.

1 *Warner v Couchman* [1912] AC 35 at 38, HL, per Lord Loreburn LC; *Mills v Smith (Sinclair, third party)* [1964] 1 QB 30, [1963] 2 All ER 1078.

2 See *Mills v Smith (Sinclair, third party)* [1964] 1 QB 30, [1963] 2 All ER 1078; and PARA 571 et seq post.

3 *Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216, DC; cf *Cornish v Accident Insurance Co* (1889) 23 QBD 453, CA.

4 *Reynolds v Accidental Insurance Co* (1870) 22 LT 820.

5 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45.

6 *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, CA.

7 *Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839 at 844, Ex Ch, per Cockburn CJ.

8 *Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839, Ex Ch.

9 For cases where exceptions applied see *Cornish v Accident Insurance Co* (1889) 23 QBD 453, CA (exception of accidents happening by exposure to obvious risks; insured attempted to cross railway line in front of approaching train); *Re United London and Scottish Insurance Co Ltd, Brown's Claim* [1915] 2 Ch 167, CA (exception of accident caused by anything inhaled; involuntary inhalation of gas).

10 *Challis v London and South Western Rly Co* [1905] 2 KB 154, CA.

11 *Shirt v Calico Printers' Association* [1909] 2 KB 51, CA.

12 *Brintons Ltd v Turvey* [1905] AC 230, HL; *Grant v Kynoch* [1919] AC 765, HL.

13 *Pyrah v Doncaster Corp'n* [1949] 1 All ER 883, CA; cf *Roberts v Dorothea Slate Quarries Co Ltd* [1948] 2 All ER 201, HL (silicosis).

14 *Fitzsimons v Ford Motor Co Ltd (Aero Engines)* [1946] 1 All ER 429, CA. See also *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 All ER 949, CA, where the insured, while in a highly emotional state, shot his wife's lover, and it was held, by the majority, for different reasons, that the death was not caused by an accident.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/571. Exposure to elements.

571. Exposure to elements.

Even where there are no antecedent circumstances which can be separately visualised and described as 'an accident'¹, the results to the victim may nonetheless be accidental. Injury or death caused by lightning², sunstroke³ or earthquake⁴ has been held to be accidental. Similarly, where a man in the course of his work is exposed to excessive heat coming from a boiler and becomes exhausted⁵ or has to stand in icy cold water and sustains pneumonia⁶ or, having got overheated, is exposed to a draught resulting in pneumonia⁷ or sustains sub-acute rheumatism as a result of baling out a flooded mine⁸, his injuries have been held to be accidental.

1 As to the distinction between 'accident' and 'an accident' see PARA 570 ante.

2 *Andrew v Failsforth Industrial Society* [1904] 2 KB 32, CA.

3 *Morgan v Zenaida (Owners)* (1909) 25 TLR 446, CA; *Davies v Gillespie* (1911) 105 LT 494, CA. It is thought that *Sinclair v Maritime Passengers' Assurance Co* (1861) 3 E & E 478, which is to the contrary, must be regarded as wrongly decided unless a valid distinction can be drawn for this purpose between 'accident' and 'an accident', or the workmen's compensation decisions are disregarded. See also *De Souza v Home and Overseas Insurance Ltd* (1990) Times, 19 September, CA, where it was considered that the term 'accidental bodily injury' had to be construed together with 'outward violent and visible means' with the result that a death from heatstroke was not covered and the insurers avoided liability.

4 *Brooker v Thomas Borthwick & Sons (Australasia) Ltd* [1933] AC 669, PC.

5 *Ismay, Imrie & Co v Williamson* [1908] AC 437, HL.

6 *Alloa Coal Co Ltd v Drylie* 1913 SC 549.

7 *Brown v John Watson Ltd* [1915] AC 1, HL.

8 *Glasgow Coal Co Ltd v Welsh* [1916] 2 AC 1, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/572. Excessive strain on already defective physique.

572. Excessive strain on already defective physique.

Another class of case in which, although it is difficult to visualise a separate event preceding the injury which could be classified as 'an accident'¹, an injury may nonetheless fall to be regarded as accidental, is where a man with a naturally defective physique is subjected to stress, strain, exertion or shock which his system cannot stand. Where a man injures his spine by lifting a heavy weight in the ordinary course of his employment² or dislocates the cartilage of his knee by stooping to pick up a marble³, or by reason of exertion sustains a hernia⁴, a cerebral haemorrhage⁵ or a rupture of an already diseased aorta⁶, or sustains shock by witnessing an accident involving another workman⁷ or an apoplectic stroke by the exertion of running and excitement⁸, his injury has been held to be accidental⁹. Probably there is no distinction of substance between 'injury by accident' and 'injury caused by an accident'; if any bodily organ fails from inherent physiological processes which are merely the operation of nature the case falls within neither formula, but if something, whatever it may be, can be identified as causing a particular physiological process, be it the reception of water into the lungs leading to drowning¹⁰ or the impact of the rays of the sun leading to sunstroke¹¹, that something constitutes 'an accident' if it leads to deleterious results.

1 As to the distinction between 'accident' and 'an accident' see PARA 570 ante.

2 *Martin v Travellers' Insurance Co* (1859) 1 F & F 505; *Horsfall v Pacific Mutual Insurance Co* 98 Am St R 846 (1903), distinguished in *Re Scarr and General Accident Assurance Corpn* [1905] 1 KB 387.

3 *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750, CA.

4 *Fenton v Thorley & Co Ltd* [1903] AC 443, HL.

5 *M'Innes v Dunsmuir and Jackson Ltd* 1908 SC 1021.

6 *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242, HL.

7 *Yates v South Kirkby Featherstone and Harmsworth Collieries Ltd* [1910] 2 KB 538, CA.

8 *Aitken v Finlayson, Bonsfield & Co Ltd* 1914 SC 770.

9 In *Re Scarr and General Accident Assurance Corpn* [1905] 1 KB 387 it was held, approving *Appel v Aetna Life Assurance Corpn* 86 App Div 83 (1903) (NY), that where a man, as a result of exertion in ejecting a drunkard, sustained a dilatation of an already diseased heart, this was not an injury sustained by accident. It is submitted that in the light of the cases cited in notes 2-8 supra this decision must be regarded as wrongly decided.

10 *Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839, Ex Ch.

11 *Morgan v Zenaida (Owners)* (1909) 25 TLR 446, CA; *Davies v Gillespie* (1911) 105 LT 494, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/573. Injury by disease.

573. Injury by disease.

Where the cause of disablement or death is an idiopathic disease, that is to say a morbid condition of unknown aetiology which is dependent normally on the personal factors of the sufferer, this is not an 'injury by accident'¹. Similarly, where an occupational disease gradually develops over a long period of exposure to certain conditions without any identifiable incident at any identifiable point of time, the resulting condition cannot be called an 'injury by accident'; examples are dermatitis due to long continued exposure to substances not necessarily irritant², silicosis due to prolonged inhalation of silica dust³, anthracosis (another lung disease) due to dust⁴, and enteritis due to exposure to sewer gas⁵. However, where accidental circumstances can be established as the basis of the disease, the position is different; for example, infection of a woolsorter by a stray anthrax germ⁶, of a gardener by tetanus from the soil after injuring his foot at work⁷, and of a man working in artificial manure consisting mainly of bone dust by a bacillus common in bone dust⁸, have been held to be injury by accident.

1 *Brintons Ltd v Turvey* [1905] AC 230 at 233, HL, per Lord Halsbury LC; *Winspear v Accident Insurance Co* (1880) 6 QBD 42 at 45, CA, per Lord Coleridge CJ; see also *Isitt v Railway Passengers Assurance Co* (1889) 22 QBD 504 at 512 per Wills J. As to exceptions relating to disease see PARA 585 post.

2 *Petschett v Preis* (1915) 31 TLR 156, CA.

3 *Williams v Guest, Keen and Nettlefolds* [1926] 1 KB 497, CA; *Roberts v Dorothea Slate Quarries Co Ltd* [1948] 2 All ER 201, HL.

4 *Cole v London and North Eastern Rly Co* (1928) 21 BWCC 87, CA.

5 *Broderick v LCC* [1908] 2 KB 807, CA; *Eke v Hart-Dyke* [1910] 2 KB 677, CA.

6 *Brintons Ltd v Turvey* [1905] AC 230, HL.

7 *Walker v Mullins* (1908) 42 ILT 168.

8 *Grant v Kynoch* [1919] AC 765, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/574. Injury caused by negligence.

574. Injury caused by negligence.

One of the commonest causes of injury is negligence, although the injury is not by reason of the negligence rendered non-accidental¹. Accordingly in such a case the policy applies, whether the negligence is that of a third party or of the insured himself². Where the insured crosses a railway line without taking proper care and is knocked down by an approaching train³, or takes the wrong bottle and drinks a dose of poison instead of medicine⁴, his injuries are accidental within the meaning of the policy.

1 See *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111.

2 *Clidero v Scottish Accident Insurance Co* (1892) 19 R 355 at 363, Ct of Sess, per Lord M'Laren; cf para 575 post.

3 *Cornish v Accident Insurance Co* (1889) 23 QBD 453, CA.

4 *Cole v Accident Insurance Co Ltd* (1889) 5 TLR 736, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(ii) Policies Insuring Against Accidental Injury/575. Injury caused by a wilful act.

575. Injury caused by a wilful act.

An injury caused by the wilful or even criminal act of a third person, provided the insured is not a party or privy to it¹, is to be regarded as accidental for the purposes of the policy², since from the insured's point of view it is not expected or designed³. Injuries sustained by a gamekeeper in a criminal attack upon him by poachers⁴, by a cashier who was murdered by a robber⁵, and by a master at an industrial school who was murdered by the boys⁶, have been held to be accidental. However, if the immediate⁷ cause of the injury is the deliberate and wilful act of the insured himself, there would seem to be no accident, and no claim will lie under the policy⁸, at any rate if the insured is not mentally disordered at the time of his act⁹.

1 *Midland Insurance Co v Smith* (1881) 6 QBD 561.

2 *Letts v Excess Insurance Co* (1916) 32 TLR 361, where it was not suggested that the sinking of the Lusitania by a submarine was otherwise than an accident for the purpose of the policy.

3 See *Trim Joint District School Board of Management v Kelly* [1914] AC 667, HL; and PARA 569 note 1 ante.

4 *Anderson v Balfour* [1910] 2 IR 497, CA.

5 *Nisbet v Rayne and Burn* [1910] 2 KB 689, CA.

6 See *Trim Joint District School Board of Management v Kelly* [1914] AC 667, HL; and PARA 569 note 1 ante.

7 See *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111, where the immediate cause of the injury was distinguished from the predisposing cause, following the reasoning of Salmon LJ in *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554 at 580, [1971] 2 All ER 949 at 963, CA.

8 *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 595, [1938] 2 All ER 602 at 604, HL, per Lord Atkin; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA (person insured under public liability policy threatened another with a loaded gun and involuntarily killed him); *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111 (injury caused by driver who had consumed excess alcohol was held to be accidental, since it was his driving, not the consumption of alcohol, which was the immediate cause of injury; drinking was the predisposing cause; liability was avoided, however, by a term of the policy relating to criminal acts); *Dhak v Insurance Co of North America (UK) Ltd* [1996] 2 All ER 609, [1996] 1 WLR 936, CA (no accident where nurse with many years experience died following drinking alcohol to excess as she could have foreseen what might happen and had taken a calculated risk of injury). See PARAS 574 ante, 576 et seq post.

9 Cf *Horn v Anglo-Australian and Universal Family Life Assurance Co* (1861) 30 LJCh 511 (where in a life policy there was no exception against suicide, money was payable in the event of the insured committing suicide while insane); *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iii) Policies in More Stringent Terms/576. Injury resulting from accident caused by violent, external and visible means.

(iii) Policies in More Stringent Terms

576. Injury resulting from accident caused by violent, external and visible means.

A form of clause now in common use in accident insurance to indicate the kind of injury covered by the policy is 'injury resulting solely and directly from accident caused by violent external and visible means'¹. Phrases of this kind were introduced to limit the width which might be covered by a general phrase such as 'injury by accident'. It does not seem, however, that anything of any substance has been achieved by the change of formula².

¹ The phrase 'violent, accidental, external and visible means' was adversely criticised in *Re United London and Scottish Insurance Co, Brown's Claim* [1915] 2 Ch 167, CA; but see *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750, CA; *Burridge & Son v F H Haines & Sons* (1918) 118 LT 681; and *Sinclair v Maritime Passengers' Assurance Co* (1861) 3 E & E 478. See *De Souza v Home and Overseas Insurance Ltd* (1990) Times, 19 September, CA, where it was considered that the term 'outward violent and visible means' had to be construed together with 'accidental bodily injury', with the result that a death from heatstroke was not covered and the insurers avoided liability.

If the phrase 'accidental means' is used in the policy, it seems that it is synonymous with, or at any rate adds nothing to, the phrase 'by accident': see *Hamlyn v Crown Accidental Insurance Co Ltd* supra. The principles set out in PARAS 569-575 ante would therefore apply.

² See note 1 supra; and PARAS 577-578 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iii) Policies in More Stringent Terms/577. Violent means.

577. Violent means.

In relation to the injuries covered by a policy of accident insurance¹, 'violent' has been interpreted as connoting the antithesis to 'without any violence at all'². It does not, therefore, postulate the presence of brutal strength or savage temper, as when the victim is bitten by a dog³. Again, an external cause of death, such as the inhalation of gas, may, it seems, be violent inasmuch as it does violence to the human frame by rendering it incapable of functioning⁴. Similarly, where the cause of injury is some extra exertion or exercise of effort on the part of the insured, as where he stoops to pick up a marble, it is violent in the sense that it does damage impairing the bodily functions, however impaired they may have been before⁵.

1 See PARA 576 ante.

2 *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750 at 752, CA, per Lord Esher MR.

3 *Mardorf v Accident Insurance Co* [1903] 1 KB 584 at 588 per Wright J.

4 Cf *Re United London and Scottish Insurance Co, Brown's Claim* [1915] 2 Ch 167, CA; the actual decision was as to the application of an exception in the policy.

5 *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750, CA; cf *Clidero v Scottish Accident Insurance Co* (1892) 19 R 355, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iii) Policies in More Stringent Terms/578. External and visible means.

578. External and visible means.

'External means' is used to point the contrast with something internal. Any cause which is not internal must be external¹, but this does not mean that the injury must be external; there may be, and often is, nothing externally visible to indicate the presence of internal injury at all². The effect of the term is therefore to underline that disorders arising within the human body, without ascertainable reference at all to anything coming from outside, are not covered. Therefore, there are certain classes of injury such as hernia³, or of disease such as pneumonia⁴ or erysipelas (skin infection)⁵, where the insured may or may not be entitled to recover, according to whether he can show that some external, as opposed to some internal, cause has operated as the effective cause⁶. Similarly, if a man falls into a river and is drowned or falls on to a railway line and is hit by a train it is immaterial that he only fell because he had an epileptic fit; if he is alive when the water gets into his lungs and leads to suffocation, or when the train cuts off his head thus stopping the motivating power to the heart, the cause of death is drowning or decapitation and not the anterior fit⁷.

'Visible means' is an attempted refinement which has not succeeded in achieving any strictly rational meaning. It has been held that an external cause is necessarily a visible one⁸.

1 *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750 at 752, CA, per Lord Esher MR.

2 *Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839 at 844, Ex Ch, per Cockburn CJ; see also *Martin v Travellers' Insurance Co* (1859) 1 F & F 505; *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750, CA, followed in *Burridge & Son v F H Haines & Sons* (1918) 118 LT 681.

3 *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122.

4 *Isitt v Railway Passengers Assurance Co* (1889) 22 QBD 504; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, CA.

5 *Mardorf v Accident Insurance Co* [1903] 1 KB 584.

6 As to causation see further PARAS 584-586 post.

7 *Winspear v Accident Insurance Co Ltd* (1880) 6 QBD 42, CA (insured in fit fell into water); *Reynolds v Accidental Insurance Co* (1870) 22 LT 820 (insured in water seized with a fit); *Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216 (insured in fit fell on railway line).

8 *Hamlyn v Crown Accidental Insurance Co Ltd* [1893] 1 QB 750 at 754, CA; *Burridge & Son v F H Haines & Sons Ltd* (1918) 118 LT 681.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iii) Policies in More Stringent Terms/579. Special kinds of accident.

579. Special kinds of accident.

Sometimes the protection of the policy is limited to accidents of a particular kind, such as railway accidents¹ or accidents of transit². To give rise to a claim it is not necessary, unless the policy so provides³, that there should be an accident to the train or vehicle by which the insured is travelling; it is sufficient if the accident happens in the course of the transit and arises out of the fact of the journey⁴. The accident may happen during the actual transit, whilst the vehicle is in motion⁵; but the policy is equally applicable to an accident which happens whilst the insured is in the act of entering or leaving the vehicle at the beginning or end of his journey, as, for instance, where he slips on the step of the vehicle⁶. Where the insurance covers accidents in the course of a journey undertaken for business purposes, the journey must have been undertaken primarily, not incidentally, for business purposes; but if some other purpose is an equal reason for undertaking the journey, the insurer will be liable if it is not the primary purpose⁷.

1 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45.

2 *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC; *Killick v Rendall* [2000] 2 All ER (Comm) 57, CA (insurance of company director travelling on behalf of the insured company).

3 As to what is included in the policy see PARAS 580-583 post.

4 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45.

5 *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC.

6 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45.

7 *Killick v Rendall* [2000] 2 All ER (Comm) 57, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iv) Benefits Recoverable/580. Lump sum benefits for specific injuries or death.

(iv) Benefits Recoverable

580. Lump sum benefits for specific injuries or death.

The policy usually provides for payment of a lump sum in the event of the insured's death by accident, and of other sums, varying in amount according to the nature and extent of the injury¹, in the event of the insured sustaining certain specified injuries such as the loss of sight in one eye or total loss of sight². Where the policy provides for payment of compensation in the event of non-fatal injury, but makes no special provision for its amount, the insured is entitled to receive compensation for his pain and suffering and expenses incurred to an amount not exceeding the amount payable in case of death³.

1 Sometimes the policy provides for increased compensation for certain forms of accident: see *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592 at 594, PC, where double benefit was payable if the insured at the time of the accident was a passenger on a public conveyance; see also PARA 579 ante.

2 See eg *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA; *Long v Graham* [1967] NZLR 1030, NZ SC.

3 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(iv) Benefits Recoverable/581. Periodical payments during disablement.

581. Periodical payments during disablement.

The injury, in addition to causing pain and suffering, may disable the insured from attending to his affairs and thus cause him pecuniary loss. This loss is in the nature of a consequential loss¹; the injury is not its proximate, but only its remote cause, and unless the policy so provides the insured cannot claim compensation in respect of it². However, in practice provision is often made for payment of compensation by means of periodical payments during the period of disablement, although this will often be subject to a limitation of the period during which compensation for disablement is payable. The effect of the provision varies according to the terms in which it is expressed. The compensation may be payable in the event of the insured being wholly disabled from following his usual business or occupation³. In such a case the insured may be wholly disabled although he is able to attend to some details of his business. Thus a solicitor who is confined to his room by reason of a sprained ankle is wholly disabled although he is able to give directions to a clerk or dictate letters; it is sufficient that he is wholly disabled from performing the most substantial part of his business⁴. However, by the terms of the provision the insured may be disentitled to compensation if he is able to attend to any part of his business⁵ or indeed to business of any kind⁶.

1 As to consequential loss see PARAS 800-804 post.

2 *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45. As to the doctrine of proximate cause see PARAS 584-586 post.

3 See *Hooper v Accidental Death Insurance Co* (1860) 5 H & N 546 at 556, 558, Ex Ch; *Sargent v GRE (UK) Ltd* [1997] PIQR Q128, CA (meaning of permanent total disablement from attending to any occupation). The right to recover may depend upon the insured's occupation. By a sprained ankle, a teacher of dancing would be wholly disabled from following his occupation, whereas a teacher of mathematics might not be. See further *Williams v Lloyd's Underwriters* [1957] 1 Lloyd's Rep 118; *Cathay Pacific Airways Ltd v Nation Life and General Assurance Co Ltd* [1966] 2 Lloyd's Rep 179; *Walton v Airtours plc* [2002] EWCA Civ 1659, [2002] All ER (D) 34 (Nov) (inability of the insured 'to follow any occupation').

4 *Hooper v Accidental Death Insurance Co* (1860) 5 H & N 546, Ex Ch.

5 *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592 at 594, PC.

6 *Pocock v Century Insurance Co Ltd* [1960] 2 Lloyd's Rep 150.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(v) Exceptions/582. Exclusions of certain risks.

(v) Exceptions

582. Exclusions of certain risks.

A policy of accident insurance normally contains a number of exceptions¹, excluding from its scope either cases where the death or disablement is due to particular causes such as disease², war risks³, poison⁴ or inhalation⁵, or to accidents happening in particular circumstances such as whilst the insured is under the influence of intoxicating liquor⁶ or is travelling in a prohibited area⁷ or has attained a certain age⁸, or the accident results from his own criminal act⁹. Suicide also is usually excepted¹⁰.

1 As to exceptions generally see PARA 99 ante.

2 For the exceptions excluding death or disablement from disease see PARA 585 post.

3 *Letts v Excess Insurance Co* (1916) 32 TLR 361; *Coxe v Employers' Liability Assurance Corp'n Ltd* [1916] 2 KB 629. Prima facie 'war' includes civil war: *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* [1949] 1 All ER 845n, HL. As to insurance against war risks generally see PARA 808 et seq post.

4 *Cole v Accident Insurance Co* (1889) 5 TLR 736, CA.

5 *Re United London and Scottish Insurance Co, Brown's Claim* [1915] 2 Ch 167, CA.

6 *Mair v Railway Passengers Assurance Co Ltd* (1877) 37 LT 356, DC; *MacRobbie v Accident Insurance Co* (1886) 23 SLR 391; *Louden v British Merchants Insurance Co Ltd* [1961] 1 All ER 705, [1961] 1 WLR 798.

7 *Stoneham v Ocean Railway and General Accident Insurance Co* (1887) 19 QBD 237 at 241.

8 *Lloyds Bank Ltd v Eagle Star Insurance Co Ltd* [1951] 1 All ER 914.

9 See *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111, where the insured was driving a car after consuming an excess amount of alcohol.

10 *Harvey v Ocean Accident and Guarantee Corp'n* [1905] 2 IR 1, CA; cf paras 530, 575 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(v) Exceptions/583. Exposure to obvious risk, needless peril or exceptional danger.

583. Exposure to obvious risk, needless peril or exceptional danger.

Policies of accident insurance may exclude liability for accidents caused by the insured exposing himself to the 'obvious risk of injury'. In the absence of negligence, such an exception has no application¹; nor does it apply to all cases of negligence². Its application is limited to cases where the risk of injury is obvious to the insured or would be obvious to him if he was paying reasonable attention to what he was doing³. Where, for example, the insured is knocked down and killed by a train whilst taking a short cut along a railway line⁴ or whilst crossing the line at a place where there is no regular crossing⁵, or where he goes too near the edge of a cliff whilst gathering wild flowers and falls over⁶, the insurers are not liable. On the other hand, the exception does not apply to a person using the road⁷ or crossing the street⁸ with reasonable care or to a skilled swimmer going out for a swim even on a chilly night⁹.

A more modern form of accident policy may exclude liability consequent upon the insured's deliberate exposure to 'exceptional danger' or wilfully exposing himself to 'needless peril'. In the former case the word 'deliberate' imports a subjective test and the exception does not apply where he drives a car knowing that he has consumed an excessive amount of alcohol unless there is evidence that he thought about the risk he was taking and deliberately chose to ignore it¹⁰. In a case where injury caused by 'wilful exposure to needless peril' was excluded from cover, it was not enough to show an intentional act which caused the peril; rather there had to be a conscious act of volition (including recklessness) directed to the running of the risk¹¹.

1 *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456, CA, per Lindley LJ.

2 *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 457, CA, per Lindley LJ.

3 *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 457, CA, per Lindley LJ; cf *Mair v Railway Passengers Assurance Co* (1877) 37 LT 356.

4 *Lovell v Accident Insurance Co* (1875) 39 JP 293.

5 *Cornish v Accident Insurance Co* (1889) 23 QBD 453, CA.

6 *Walker v Railway Passengers Assurance Co* (1910) 129 LT Jo 64, CA.

7 *Shilling v Accidental Death Insurance Co* (1858) 1 F & F 116.

8 *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456, CA, per Lindley LJ.

9 *Sangster's Trustees v General Accident Assurance Corp'n* (1896) 24 R 56, Ct of Sess.

10 *Marcel Beller Ltd v Hayden* [1978] QB 694, [1978] 3 All ER 111.

11 *Morley and Morley v United Friendly Insurance plc* [1993] 1 Lloyd's Rep 490, CA (insured jumped on bumper of car which was then driven by fiancée, who inadvertently accelerated instead of stopping; held that although the peril was clearly unnecessary, the insured's act was a 'momentary act of stupidity', but that that did not amount to wilful exposure to the peril).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(vi) Rules of Causation/584. The doctrine of proximate cause.

(vi) Rules of Causation

584. The doctrine of proximate cause.

The doctrine of proximate cause¹ applies to accident insurance². If the policy postulates the happening of something which can be called 'an accident'³, the injury must be proximately caused by the accident and the death or disablement must be proximately caused by the injury⁴. However, the application of the doctrine may be modified or excluded by the terms of a particular policy⁵; but the intention of the parties must be clearly expressed⁶. Each case turns on the construction of the particular policy and, unless the language is identical, one case is no authority for another unless the general principle can be extracted⁷.

1 As to the doctrine of proximate cause see generally paras 356-357 ante.

2 *Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216 at 221, DC, per Watkin Williams J; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 601, CA, per Kennedy LJ.

3 See *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 1 All ER 949, CA; and PARA 570 ante.

4 *Isitt v Railway Passengers Assurance Co* (1889) 22 QBD 504; *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45; *Mardorf v Accident Insurance Co* [1903] 1 KB 584; *Smith v Cornhill Insurance Co Ltd* [1938] 3 All ER 145; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 1 All ER 949, CA. Hence, if the accident renders a surgical operation necessary, and the insured dies during the operation, his death is proximately caused by the accident: *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122; *Isitt v Railway Passengers Assurance Co* supra.

5 *Coxe v Employers' Liability Assurance Corpn* [1916] 2 KB 629.

6 *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 602, CA, per Kennedy LJ.

7 *Smith v Cornhill Insurance Co Ltd* [1938] 3 All ER 145 at 150 per Atkinson J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(vi) Rules of Causation/585. Disease as proximate cause of death or disablement.

585. Disease as proximate cause of death or disablement.

The policy may contain an exception relating to disease; it may be framed in general terms, or specific diseases may be excepted. Where the death or disablement is solely caused by disease there is no injury by accident and the insurers are not liable whether the policy contains such an exception or not¹. Difficulties arise where there is some apparent connection between the disease and an accident. Much turns on the language of the exception, but generally the exception applies where the disease arises naturally and is the proximate cause of the death or disablement². If the disease is only the remote cause of the death or disablement, even though the accident would not have happened but for the disease, the exception has no application. If the insured is seized with a fit and falls into a stream and is drowned or falls in front of a train and is killed the insurers are liable, notwithstanding the presence in the policy of an express exception against fits. The fit is only the remote cause of the death; the insured is drowned or killed by accident³.

1 As to injury by disease see PARA 573 ante. Cf *Cawley v National Employers' Accident and General Assurance Association Ltd* (1885) Cab & El 597, where the exception excluded death by disease, although accelerated by accident.

2 *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122, where the pleadings were amended to raise the question whether the disease arose from natural causes. As to the onus of proof in relation to exceptions see PARA 99 ante.

3 See *Reynolds v Accidental Insurance Co* (1870) 22 LT 820; *Winspear v Accident Insurance Co Ltd* (1880) 6 QBD 42, CA (both concerned with drowning); and *Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216, DC (train accident).

UPDATE

585 Disease as proximate cause of death or disablement

NOTE 2--See *Blackburn Rovers Football and Athletic Club plc v Avon Insurance plc* [2005] EWCA Civ 423, [2005] Lloyd's Rep IR 447 (whether policy taken out by football club covered back injury to player caused in part by degenerative spinal condition typical of most men).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(vi) Rules of Causation/586. Disease as link in chain of causation.

586. Disease as link in chain of causation.

An exception relating to disease is equally inapplicable¹ where the death or disablement, though ultimately due to disease, is nevertheless proximately caused by accident, the disease being a mere link in the chain initiated dominantly and effectively by the accident². Where a fall causes hernia or pneumonia, from which the insured dies, his death is caused by accident, and an express exception against hernia³ or pneumonia⁴ has no application. Even where the fall brings out tuberculosis which was latent in the insured's system, but which would not have manifested itself but for the fall, the disablement is proximately caused by the fall, and is not within an exception against disease⁵. The same principle applies to an insured who is bitten by a dog and dies of hydrophobia⁶. However, the exception may be so worded as to exclude disease, however caused, and then if the death is caused by an excepted disease the insurers will not be liable even though the disease is proximately caused by accident⁷.

1 As to the exception of disease as a proximate cause of death or disablement see PARA 585 ante.

2 For a discussion of the principle, in relation to a policy of marine insurance, see *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, HL, where the death-blow was given to a ship by a torpedo (an insured peril), although the final loss of the ship was due to a storm; see PARAS 356-357 ante.

3 *Fitton v Accidental Death Insurance Co* (1864) 17 CBNS 122.

4 *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, CA; cf *Isitt v Railway Passengers Assurance Co* (1889) 22 QBD 504; *Mardorf v Accident Insurance Co* [1903] 1 KB 584.

5 *Fidelity and Casualty Co of New York v Mitchell* [1917] AC 592, PC.

6 *Mardorf v Accident Insurance Co* [1903] 1 KB 584 at 588 per Wright J.

7 *Smith v Accident Insurance Co* (1870) LR 5 Exch 302 at 309 per Kelly CB; *Jason v British Traders Insurance Co Ltd* [1969] 1 Lloyd's Rep 281.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(vii) Accident Insurance by Coupon/587. Nature of coupon insurance.

(vii) Accident Insurance by Coupon

587. Nature of coupon insurance.

The purchase of a newspaper or other article sometimes confers upon the purchaser the right to an insurance against accident. The insurance arises by virtue of some arrangement made by the proprietors of the newspaper or article sold¹ with insurers², and the position of the purchaser is defined in a document or coupon which is annexed to the article or, in the case of a newspaper, printed as part of it. In some cases nothing beyond the purchase is necessary to complete the insurance³; in others the coupon must be filled up and it may have to be registered with the insurers⁴. The protection given by the coupon is usually in a narrow compass, being limited to accidents to vehicles in which the holder of the coupon is a passenger⁵, or accidents to pedestrians⁶.

¹ The proprietors therefore undertake to the purchaser that such arrangements have been made: see *Law v George Newnes Ltd* (1894) 21 R 1027 at 1033, Ct of Sess.

² The arrangement is necessary because of the requirements of the Financial Services and Markets Act 2000 s 19(1). See PARA 22 ante.

³ See *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA. Payment is not essential: *Shanks v Sun Life Assurance Co of India* 1896 4 SLT 65.

⁴ *General Accident, Fire and Life Assurance Corp'n v Robertson* [1909] AC 404, HL. See PARA 147 note 6 ante.

⁵ A person riding a bicycle is not a passenger in a vehicle (*McMillan v Sun Life Insurance Co of India* 1896 4 SLT 66), but he is in charge of a vehicle for the purposes of an exception (*Harper v Associated Newspapers Ltd* (1927) 43 TLR 331; *Hansford v London Express Newspaper Ltd* (1928) 44 TLR 349).

⁶ A person who goes for a bicycle ride does not become a pedestrian merely because he stops for a talk or has to wheel his bicycle up a hill: *Harper v Associated Newspapers Ltd* (1927) 43 TLR 331 at 332 per Roche J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(1) ACCIDENT INSURANCE/(vii) Accident Insurance by Coupon/588. Payment in case of death.

588. Payment in case of death.

In the event of a fatal accident, provision is usually made for payment of the sum insured to a specified person, such as the holder's wife¹ or next of kin. Where the coupon is issued by a newspaper power is usually reserved to make the payment to the person adjudged by the editor, or some other person, to be the holder's next of kin, in which case his decision is final².

¹ In *Re Lambert, Public Trustee v Lambert* (1916) 84 LJCh 279, a provision that the holder's wife was to be 'entitled to the benefit' of the insurance was held to mean that she too was insured against accident and not that she was entitled to receive compensation for his death.

² *Law v George Newnes Ltd* (1894) 21 R 1027, Ct of Sess; *Hunter v Hunter* (1904) 7 F 136, Ct of Sess; cf *Da Costa v Prudential Assurance Co* (1918) 120 LT 353, CA; *O' Reilly v Prudential Assurance Co* [1934] Ch 519, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(2) SICKNESS INSURANCE/589. Nature of contract.

(2) SICKNESS INSURANCE

589. Nature of contract.

A contract of accident insurance in the strict sense does not cover the insured against disablement or incapacity arising from disease unless the disease is directly or indirectly related to some accident or injury caused by accident. However, a contract of sickness insurance is normally drawn so as to cover the insured against incapacity arising from disease, whether or not the disease is related to an accident or injury caused by accident and whatever the nature of the disease¹. A sickness policy may provide for protection against loss of income as a result of illness, known as permanent health insurance, or for the payment of specified sums on the insured being diagnosed as suffering from a particular illness, known as critical illness insurance. The two types of cover may be combined in one policy as may accident and sickness insurance.

¹ As to injury by disease see PARA 573 ante. As to exceptions in accident policies relating to disease see PARA 585 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/6. ACCIDENT AND SICKNESS INSURANCE/(2) SICKNESS INSURANCE/590. Principles of law applicable.

590. Principles of law applicable.

The law applicable to sickness insurance is basically the same as that applicable to accident insurance, although normally there is no distinction by reference to whether the sickness is due to an accident or other cause¹. The insured is normally required to give information in the proposal form as to his previous medical history and to sign a declaration as to his being in good health and not having suffered from any serious illness over a specified period². He may also have to submit to a medical examination by a doctor nominated by the insurers³. Payment under the policy may be subject to the survival of the insured for a specified period after diagnosis of a qualifying illness⁴, or to the insured's incapacity to follow any or a specified occupation⁵.

1 As to the nature of the contract see PARA 589 ante. Contracts of insurance providing specified benefits against risks of persons becoming incapacitated in consequence of sustaining injury as a result of sickness or infirmity are 'contracts of long term insurance' if they are contracts expressed to be in effect for a period of not less than five years or until normal retirement age, or without limit of time, and either (1) are not expressed to be terminable by the insurers; or (2) are expressed to be so terminable only in the special circumstances mentioned in the contract: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt II para IV. Contracts of insurance providing benefits or benefits in the nature of indemnity (or a combination of both) against risks of loss to the persons insured attributable to sickness or infirmity, but excluding contracts of the type referred to above, are 'contracts of general insurance': Sch 1 Pt I para 2. See PARA 21 ante.

National legislation on sickness insurance which makes the payment of medical expenses in another member state of the European Union subject to prior authorisation is a restriction on freedom to provide services unless such authorisation can be justified: Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds VGZ; Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2002] QB 409, [2001] ECR I-5473, ECJ.

2 For the interpretation of such a clause see *Cook v Financial Insurance Co Ltd* [1998] 1 WLR 1765, [1999] Lloyd's Rep IR 1, HL. As to declarations warranting the proposal see PARA 62 ante; as to questions in the proposal form concerning previous medical history see PARA 534 ante; as to the effect of non-disclosure and misrepresentation see generally para 36 et seq ante.

3 As to medical examinations in relation to life insurance see PARA 534 ante.

4 *Virk v Gan Life Holdings plc* (1999) 52 BMLR 207, [2000] Lloyd's Rep IR 159, CA. As to the effect of such a provision on the limitation of actions under the policy see PARA 184 ante.

5 *Walton v Airtours plc* [2002] EWCA Civ 1659, [2002] All ER (D) 34 (Nov) (inability of the insured 'to follow any occupation'); see also *Sargent v GRE (UK) Ltd* [2000] Lloyd's Rep IR 77, CA; *Vincent v Servite Homes Ltd* [2002] EWCA Civ 852, [2002] All ER (D) 555 (May).

UPDATE

590 Principles of law applicable

NOTE 1--Case C-157/99 *Geraets-Smits*, cited, followed: Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA; Van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2005] All ER (EC) 62, [2004] 3 WLR 374, ECJ; Case C-8/02 *Leichtle v Bundesanstalt Für Arbeit* [2006] 3 CMLR 75, ECJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(i) Peril Insured Against/591. Perils covered.

7. PROPERTY INSURANCE

(1) FIRE INSURANCE

(i) Peril Insured Against

591. Perils covered.

A policy of fire insurance, as its name indicates, is intended to protect the insured against loss caused by fire¹. In practice the protection normally extends to losses caused by events which are frequently the cause of fire but may occur without a fire resulting, such as lightning and certain kinds of explosion². If a fire results, the policy is plainly applicable³ unless an exception has become operative, and there is no commercial advantage in limiting the insurance by reference to such a fortuitous standard.

1 For the general principles applicable to fire insurance as well as to other kinds of non-marine insurance see PARA 2 et seq ante. Contracts of insurance against loss of or damage to property (other than land vehicles, railway rolling stock, aircraft, ships, or goods in transit) due to fire, explosion, storm, natural forces other than storm, nuclear energy or land subsidence are classified as insurance in respect of fire and natural forces and are 'contracts of general insurance': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, s 3(1), Sch 1 Pt I para 8; see PARA 21 ante.

2 As to explosions see PARAS 600-602 post.

3 *Gordon v Rimmington* (1807) 1 Camp 123.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(i) Peril Insured Against/592. Ignition essential.

592. Ignition essential.

There is no fire within the meaning of a fire insurance policy unless there is ignition, either of the property insured or of the premises where it is situated¹; heating or fermentation unaccompanied by ignition is not sufficient. That which is ignited must be something which was not intended to be ignited². Therefore, if property near to a source of heat in ordinary use is damaged by the excessive heat thrown out, but is not actually ignited, the damage is not within the policy, since there is no ignition except such ignition as was intended and nothing has been burned except what ought to have been burned³.

It is immaterial that the fire occurs in a place, such as a grate, where fires are intended; accordingly, where an insured lit a fire forgetting that she had hidden bank notes in the kindling the loss was recoverable⁴.

1 *Everett v London Assurance* (1865) 19 CBNS 126 at 133 per Byles J. Cf the requisites of the crime of arson: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 334, 336.

2 *Austin v Drewe* (1816) 2 Marsh 130 at 133 per Dallas CJ.

3 *Austin v Drewe* (1816) 2 Marsh 130; cf *Upjohn v Hitchens*, *Upjohn v Ford* [1918] 2 KB 48 at 51, CA, per Scrutton LJ.

4 *Harris v Poland* [1941] 1 KB 462, [1941] 1 All ER 204.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(i) Peril Insured Against/593. Cause of fire normally immaterial.

593. Cause of fire normally immaterial.

Generally, the cause of the fire may be disregarded unless it arises from an excepted peril¹ or was lit by the insured for the purpose of destroying the property insured. It is not necessary that it should be purely accidental in origin. Fires are frequently due to negligence and one of the objects of a fire policy is to protect the insured against the consequences of negligence². It is immaterial whether the fire owes its origin to negligence or, though properly lit, is negligently attended³; and it is equally immaterial whether the negligence is that of an employee, a stranger⁴ or the insured⁵. Even the fact that a fire is deliberately lit for the purpose of destroying the property insured does not disentitle the insured from recovering, unless he has lit it⁶ or someone acting with his privity or consent has done so⁷. If a fire is lit in proper circumstances, for example in a fireplace, property accidentally destroyed is covered⁸.

1 As to excepted perils see PARAS 595-602 post.

2 *Shaw v Robberds* (1837) 6 Ad & El 75 at 84 per Lord Denman CJ; *A-G v Adelaide Steamship Co* [1923] AC 292 at 308, HL, per Lord Wrenbury.

3 *Dixon v Sadler* (1839) 5 M & W 405 at 414 per Parke B; affd (1841) 8 M & W 895, Ex Ch.

4 *Dobson v Sotheby* (1827) Mood & M 90; *Shaw v Robberds* (1837) 6 Ad & El 75; *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA.

5 *Shaw v Robberds* (1837) 6 Ad & El 75; *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114 at 124, CA, per A L Smith LJ; and see *Jameson v Royal Insurance Co* (1873) IR 7 CL 126; *Herbert v Poland* (1932) 44 Ll L Rep 139; *Watkins & Davis Ltd v Legal and General Assurance Co Ltd* [1981] 1 Lloyd's Rep 674; *S & M Carpets (London) Ltd v Cornhill Insurance Co Ltd* [1982] 1 Lloyd's Rep 423, CA; *McLean Enterprises Ltd v Ecclesiastical Insurance Office plc* [1986] 2 Lloyd's Rep 416; *Broughton Park Textiles (Salford) Ltd v Commercial Union Assurance Co Ltd* [1987] 1 Lloyd's Rep 194.

6 *Upjohn v Hitchens, Upjohn v Ford* [1918] 2 KB 48 at 58, CA, per Scrutton LJ; *City Tailors Ltd v Evans* (1921) 126 LT 439 at 443, CA, per Scrutton LJ.

7 *Midland Insurance Co v Smith* (1881) 6 QBD 561.

8 *Harris v Poland* [1941] 1 KB 462, [1941] 1 All ER 204.

UPDATE

593 Cause of fire normally immaterial

NOTE 6--See *Porter v Zurich Insurance Co* [2009] EWHC 376 (QB), [2009] All ER (D) 67 (Mar) (insured acted wilfully and maliciously when setting fire and did not meet necessary test of insanity).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(i) Peril Insured Against/594. Providing information as to cause of fire.

594. Providing information as to cause of fire.

Where, in an action on a fire policy which contained an exception¹ of loss by fire occasioned by an earthquake, the insurers pleaded that the loss forming the subject of the claim was caused by earthquake and not by fire, particulars as to the cause and place of origin of the alleged fire were refused on the ground that the proper way to obtain the information required was by a request for further information². However, where insurers claimed for the recovery of money paid by them under a fire policy on the ground that the fire was caused by the deliberate act of the insured they were ordered to give particulars of the deliberate act or acts alleged³.

1 As to exceptions in fire policies see PARA 595 et seq post.

2 *G and W Young & Co Ltd v Scottish Union and National Insurance Co* (1907) 24 TLR 73, CA. As to the power to order further information see generally CPR 18; and CIVIL PROCEDURE vol 11 (2009) PARAS 611-612. As to the remitting of a case to an arbitrator or trial judge for the purpose of ascertaining the cause of the loss or damage see PARA 601 note 3 post.

3 *London Assurance v Kidson* (1935) 79 Sol Jo 641, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/595. Usual exceptions.

(ii) Excepted Perils

595. Usual exceptions.

Where a fire which causes a loss is itself caused by a peril expressly excluded by an exceptions clause in the policy, the insured cannot recover¹. A fire policy in ordinary practice comprises a number of perils so excepted, but only a few of them call for detailed consideration. Among the most important exceptions clauses in an ordinary fire insurance policy are those relating to riot, civil commotion, war, civil war, military and usurped power and explosions², and those relating to natural causes, such as earthquake or subterranean fire³.

¹ A loss due to an excepted peril, where there is no fire, is not within the policy at all and therefore need not be excluded: *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 273, CA, per Duke LJ. As to the effect of an exception in respect of fraudulent claims see *Nsubuga v Commercial Union Assurance Co plc* [1998] 2 Lloyd's Rep 682.

² See PARAS 596-602 post.

³ See eg *Tootal Broadhurst Lee Co v London and Lancashire Fire Insurance Co* (1908) Times, 21 May, PC.

UPDATE

595 Usual exceptions

NOTE 1--See *Reilly v National Insurance & Guarantee Corp'n Ltd* [2008] EWCA Civ 1460, [2009] 1 All ER (Comm) 1166.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/596. Exception of riot.

596. Exception of riot.

A claim for compensation for damage caused by a riot can be made against the police authority¹. Having regard to this remedy, insurers as a general rule have always excluded riot from their fire policies. 'Riot' is defined by statute as involving 12 or more persons, who are present together, using or threatening unlawful violence for a common purpose, and whose conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety². It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously³. The common purpose may be inferred from conduct⁴. No person of reasonable firmness need actually be, or be likely to be, present at the scene⁵. Riot may be committed in private as well as in public places⁶.

1 Riot (Damages) Act 1886 s 2(1) (as amended). See POLICE vol 36(1) (2007 Reissue) PARAS 173-177. If riot is not excluded from a policy, the insurers who pay the loss have a right to be subrogated to their insured's right to compensation: see PARA 196 ante. 'Riot' in the 1886 Act is to be construed in accordance with the provisions set out in the text and notes 2-6 infra: Public Order Act 1986 s 10(1) (amended by the Merchant Shipping Act 1995 s 314(1), Sch 12).

2 Riot Damages Act 1886 s 1(1). See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 555.

3 Ibid s 1(2).

4 Ibid s 1(3).

5 Ibid s 1(4).

6 Ibid s 1(5).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/597. Exception of civil commotion.

597. Exception of civil commotion.

A civil commotion has been described as an insurrection of the people for general purposes, though not amounting to rebellion¹, but it probably cannot be precisely defined. Turbulence or tumult is essential²; and an organised conspiracy to commit acts where there is no tumult or disturbance until after the acts does not amount to civil commotion³. However, it is not necessary to show the existence of any outside organisation at whose instigation the acts were done⁴. It therefore expresses a stage intermediate between riot and civil war⁵, and although technically it probably includes a riot⁶, once fighting begins matters have got beyond a mere civil commotion⁷.

1 *Langdale v Mason* (1780) 2 Marshall on Marine Insurances (3rd Edn) 793 at 794 per Lord Mansfield CJ. See also *Drinkwater v London Assurance Corp* (1767) 2 Wils 363; *Mason v Sainsbury* (1782) 3 Doug KB 61; *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406.

2 *London and Manchester Plate Glass Co Ltd v Heath* [1913] 3 KB 411 at 417, CA, per Buckley LJ, approved in *Cooper v General Accident, Fire and Life Assurance Corp Ltd* (1923) 128 LT 481, HL; *Pan American World Airways Inc v Aetna Casualty & Surety Co* [1974] 1 Lloyd's Rep 207 at 234, NY Dist Ct Southern Dist, per Frankel DJ (aviation insurance) (on appeal [1975] 1 Lloyd's Rep 77, US Ct of Appeals).

3 *London and Manchester Plate Glass Co Ltd v Heath* [1913] 3 KB 411, CA; *Cooper v General Accident, Fire and Life Assurance Corp Ltd* (1923) 128 LT 481, HL; *Craig v Eagle Star and British Dominions Insurance Co* (1922) 56 ILR 145.

4 *Levy v Assicurazioni Generali* [1940] AC 791 at 800, [1940] 3 All ER 427 at 431, PC, citing Welford and Otter-Barry's Law of Fire Insurance (3rd Edn) 64.

5 *Republic of Bolivia v Indemnity Mutual Marine Insurance Co Ltd* [1909] 1 KB 785 at 801, CA, per Farwell LJ.

6 *Motor Union Insurance Co Ltd v Boggan* (1923) 130 LT 588 at 591, HL, per Lord Birkenhead. As to riot see PARA 596 ante.

7 *Curtis & Sons v Mathews* [1919] 1 KB 425, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/598. Exception of war, civil war or rebellion.

598. Exception of war, civil war or rebellion.

Often an exception is framed by reference to war or war risks¹. In such a case, the actual state of affairs is taken into account, irrespective of whether there is official recognition of a state of war or a severance of diplomatic relations². A rebellion may be a war³, the rebels coming within the term 'Queen's enemies'⁴. In the absence of clear indication to the contrary the word 'war' includes a civil war⁵.

A civil war is a war which has the special characteristic of being civil, that is to say internal rather than external. A decision on whether such a war exists generally involves a consideration of (1) whether it can be said that the conflict was between opposing 'sides'; (2) what were the objects of the 'sides' and how did they set about pursuing them; and (3) what was the scale of the conflict and its effect on public order and on the life of its inhabitants⁶.

1 As to government insurance and reinsurance against war risks see PARAS 812-814, 820 post.

2 *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544, [1939] 1 All ER 819.

3 *Curtis & Sons v Mathews* [1919] 1 KB 425, CA.

4 *Secretary of State for War v Midland Great Western Rly Co of Ireland* [1923] 2 IR 102.

5 *Pesqueras y Secaderos de Bacalao de España SA v Beer* (1949) 82 Ll L Rep 501 at 514, HL, per Lord Morton.

6 *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406 at 430 per Mustill J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/599. Exception of military and usurped power.

599. Exception of military and usurped power.

The exception of military and usurped power contemplates acts of warfare committed by belligerents¹ who may be either foreign enemies invading the realm² or subjects of the Crown engaged in internal rebellion³; and it covers acts done by the forces of the Crown in repelling the enemy or suppressing the rebellion⁴. However, usurped power does not include a government that has been officially recognised⁵. Military and usurped power also connotes control of territory⁶. The usurpation has been described as consisting in the arrogation to itself by the mob of a law-making and law-enforcing power which properly belongs to the sovereign⁷.

1 This includes acts of incendiarism committed by private looters in the course of military operations: *American Tobacco Co Inc v Guardian Assurance Co Ltd* (1925) 69 Sol Jo 621, CA.

2 *Drinkwater v London Assurance Corp*n (1767) 2 Wils 363; *Rogers v Whittaker* [1917] 1 KB 942. The policy usually includes a separate exception of 'foreign enemy', but this is unnecessary as the exception against military power is sufficient.

3 *Drinkwater v London Assurance Corp*n (1767) 2 Wils 363; *Langdale v Mason* (1780) 2 Marshall on Marine Insurances (3rd Edn) 793. 'Rebellion' and 'insurrection' are usually specially excepted see PARA 598 ante.

4 *Curtis & Sons v Mathews* [1919] 1 KB 425, CA.

5 *White, Child and Beney Ltd v Eagle, Star and British Dominions Insurance Co* (1922) 127 LT 571 at 583, CA, per Bankes LJ.

6 *Pan American World Airways Inc v Aetna Casualty and Surety Co* [1975] 1 Lloyd's Rep 77, US Ct of Appeals (destruction of aircraft by Popular Front for the Liberation of Palestine).

7 *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406 at 433.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/600. Loss caused by explosion.

600. Loss caused by explosion.

Some explosions are caused by fire; others happen without its intervention, but every explosion involves the possibility of loss either by concussion¹ or by fire consequent on the explosion². Apart from an exception in the policy, there is a loss by fire within the meaning of the policy whenever property is actually burned in the course of an explosion, and it is unnecessary to inquire into the connection between the explosion and the fire. The loss is equally recoverable whether the fire which caused it arose and continued independently of the explosion³ or whether the explosion was the cause of the fire⁴ or whether the explosion was the result of the fire and its effect was to make the fire burn more strongly⁵. However, if the loss is due to concussion only and there is no actual burning it becomes necessary to inquire into the cause of the explosion; there is no liability under the policy unless the explosion was caused by fire. If the explosion was not caused by fire, the policy has no application, since the insurance is not against loss by concussion⁶. Where the explosion was caused by fire, in the absence of any exception to the contrary, the position depends upon the situation of the property affected by the concussion. If it is situated on the premises where the fire is raging the loss is caused by fire, since the explosion is the direct consequence of the fire⁷. However, if the property is situated elsewhere the loss, being solely due to concussion, is not covered⁸.

1 As to the exception of loss by concussion see PARA 602 post.

2 As to the exception of fire caused by explosion see PARA 601 post.

3 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71 at 74 per Kelly CB.

4 *Everett v London Assurance* (1865) 19 CBNS 126 at 133 per Byles J.

5 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71 at 75 per Martin B.

6 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 272, CA, per Scrutton LJ.

7 *Curtis and Harvey (Canada) Ltd v North British and Mercantile Insurance Co Ltd* [1921] 1 AC 303, PC, approving *Hobbs v Northern Assurance Co* (1886) 12 SCR 631.

8 *Everett v London Assurance* (1865) 19 CBNS 126.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/601. Exception of fire caused by explosion.

601. Exception of fire caused by explosion.

Explosions and their consequences are usually dealt with by a special stipulation in the policy, and the position then depends upon the interpretation of the particular stipulation employed. Under some old forms of stipulation liability may be excluded even where property is burned if the fire which burns the property is caused by explosion¹. In such a case, where the explosion precedes and causes the fire, no difficulty arises; the policy is plainly inapplicable. However, where a fire precedes and causes the explosion it may become necessary to distinguish the consequences of the fire from the consequences of the explosion. Loss by concussion is in any case excluded; but the effect of the explosion may be to cause a further fire, and any loss due to such further fire is within the exception². If the original fire still continues in operation, any loss due to it, even after the explosion, is not within the exception and remains covered by the policy³.

1 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257, CA; *Curtis and Harvey (Canada) Ltd v North British and Mercantile Insurance Co Ltd* [1921] 1 AC 303, PC.

2 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71, approved in *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257, CA, and in *Curtis and Harvey (Canada) Ltd v North British and Mercantile Insurance Co Ltd* [1921] 1 AC 303, PC.

3 If necessary, proceedings may be remitted by the court to an arbitrator, or by an appellate court to the trial judge, for the purpose of ascertaining further facts relevant for determining the cause of the loss or damage: *Stanley v Western Insurance Co* (1868) LR 3 Exch 71; *Curtis and Harvey (Canada) Ltd v North British and Mercantile Insurance Co* [1921] 1 AC 303, PC. As to the right of the insurers to obtain information from the insured as to the cause of damage see PARA 594 ante. The onus of proof may, by the terms of the exception, be sought to be thrown upon the insured: *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 269, CA, per Bankes LJ. See, however, PARAS 99, 111 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(ii) Excepted Perils/602. Exception of loss by explosion.

602. Exception of loss by explosion.

The refinements necessitated by special stipulations¹ were found to be unnecessary and commercially undesirable. Accordingly, a simpler form of stipulation under which liability for loss by explosion is alone excluded came into general use, the insurers being ready to accept liability in all cases where the subject matter is burned even though the fire is caused by explosion. However, liability is also accepted for loss by concussion where (1) the loss is due to the explosion of boilers used for domestic purposes only²; and (2) the loss is due to an explosion in a building not forming part of any gasworks of gas³ used for domestic purposes or used for lighting or heating the building. In these two cases there is in reality an extension of the policy.

1 As to the special stipulations see PARA 601 ante.

2 See *Willesden Corp v Municipal Mutual Insurance Ltd* [1945] 1 All ER 444n, CA, affg [1944] 2 All ER 600.

3 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iii) Proximate Cause/603. Fire as proximate cause of loss.

(iii) Proximate Cause

603. Fire as proximate cause of loss.

To constitute a loss within the meaning of a fire policy, it is not necessary to show that the subject matter of the insurance has itself been burned; it is sufficient that the loss has been proximately caused by fire¹. Losses which are the necessary consequences of a fire in the sense that, if there had been no fire, they could not have happened, are proximately caused by the fire. For example: where a fire attacks the fabric of a building and causes the roof or walls to fall upon other property in the building and destroy it², or where a painting stored in a strong room is damaged by heat from a fire outside³, the damage caused is proximately caused by the fire. Again, losses which are the reasonable and probable consequences of fire, in that they result in the ordinary course of events from the happening of a fire, are proximately caused by the fire. For example, losses may be sustained through attempts to check the progress of a fire; property may be destroyed by the water used to extinguish the flames⁴ or buildings may be blown up by the fire brigade for the purpose of preventing the fire from spreading⁵. Other losses may be sustained in attempts to save property from fire; the property may be destroyed or damaged in the course of removal⁶. In all these cases, though the property is not burned, its loss is nevertheless proximately caused by fire⁷. Losses by theft during a fire may also be regarded as proximately caused by the fire⁸.

1 As to the doctrine of proximate cause generally see PARAS 356-357 ante.

2 *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 at 271, CA, per Scrutton LJ; *Johnston v West of Scotland Insurance Co* (1828) 7 Sh 52, Ct of Sess. However, see *Tootal Broadhurst Lee Co v London and Lancashire Fire Insurance Co* (1908) Times, 21 May, PC, per Bigham J, where liability was expressly excluded under the 'fallen buildings clause'. A 'fallen buildings clause' is a clause whereby the insurance ceases if the building falls through some cause other than fire.

3 *Quorum AS v Schramm* [2002] 2 All ER (Comm) 147, [2002] 1 Lloyd's Rep 249.

4 *Ahmedbhoy Habbibhoy v Bombay Fire and Marine Insurance Co* (1912) 107 LT 668, PC; *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 97 LJKB 646, CA.

5 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71 at 74 per Kelly CB, approved in *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 at 71, [1940] 4 All ER 169 at 179, PC. In the Metropolitan Fire Brigade Act 1865 s 12(2) (repealed), it was provided, as regards fires within the metropolitan area, that any damage occasioned by the brigade in the due execution of its duties should be deemed to be damage by fire within the meaning of any fire insurance policy. This provision appears merely to have been declaratory of the common law and, no doubt for that reason, was not re-enacted.

6 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71.

7 *Stanley v Western Insurance Co* (1868) LR 3 Exch 71 at 74 per Kelly CB; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 599, CA, per Vaughan Williams LJ; *Marsden v City and County Assurance Co* (1865) LR 1 CP 232.

8 *The Knight of St Michael* [1898] P 30, approving the Canadian cases of *McGibbon v Queen Insurance Co* (1866) 10 LCJ 227, and *Harris v London and Lancashire Fire Insurance Co* (1866) 10 LCJ 268; cf *Levy v Baillie* (1831) 7 Bing 349.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iii) Proximate Cause/604. Losses not proximately caused by fire.

604. Losses not proximately caused by fire.

Losses which are not proximately but only remotely caused by fire are not covered by an ordinary fire policy. They fall into two classes: (1) losses of which the fire is in the strict sense the remote cause; and (2) consequential losses¹. Where fire causes an explosion and property in other premises, situated at a distance from the fire, is destroyed by atmospheric concussion, the fire is not the proximate, but the remote cause of the loss and the loss is not covered². However, where property is destroyed by fire, the direct consequence of the fire is the loss of the property itself. The loss of the property may involve the insured in further loss, according to circumstances; he may be compelled, for the purpose of continuing his business, to rent other premises to take the place of those destroyed and he may lose the profits which he would have been able to earn if his business had not been interrupted by the fire. These losses are remotely and not proximately caused by the fire; they are not its natural, but only its accidental, consequences³.

1 As to consequential loss insurance see PARAS 800-804 post.

2 As to loss caused by the explosion see PARAS 600-602 ante.

3 *Re Wright and Pole* (1834) 1 Ad & El 621; followed in *Menzies v North British Insurance Co* (1847) 9 Durl 694, Ct of Sess; *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699, HL. See generally *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45 at 58 per Pollock CB. A special insurance may be effected against consequential loss: see PARAS 800-804 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iii) Proximate Cause/605. Proximate cause as basis of exceptions.

605. Proximate cause as basis of exceptions.

The doctrine of proximate cause is applied for the purpose of determining whether a loss is caused by an excepted peril. If property is not burned at all, but is destroyed by the direct operation of an excepted peril as, for instance, by the concussion of an explosion, the explosion is the proximate cause of the loss and it is immaterial that the explosion was itself caused by fire¹. If the subject matter is burned, but the fire which burned it derived its origin from an excepted peril, the liability of the insurers depends upon whether the excepted peril is to be regarded as the proximate cause of the loss or not. Where the fire is the natural consequence of the excepted peril, the excepted peril is the proximate cause of the loss². Where a bomb dropped from a hostile aircraft in war time sets a warehouse on fire, the loss of the warehouse, though caused by fire, is the natural consequence of military operations, and is therefore proximately caused by the excepted peril of 'military or usurped' power³. Where there are two competing causes, the effective or dominant cause must be taken as the proximate cause even though it is more remote in point of time⁴.

On the other hand, where the fire is not the natural but merely an accidental consequence of the excepted peril, the proximate cause of the loss is the fire, the excepted peril being the remote cause only, and the loss is therefore covered by the policy⁵. Where a fire which is directly caused by an excepted peril spreads solely by the operation of natural causes⁶, all losses caused by the fire, however distant from the premises on which the fire originated, are proximately caused by the excepted peril⁷. However, if the spread of the fire is due not to natural causes but to the intervention of a new and independent cause, the chain of causation is broken, and the fire, being an accidental consequence only of the excepted peril, becomes a fresh fire. Therefore, the excepted peril is not the proximate cause of the subsequent losses, which are caused by the fresh fire alone, and are therefore covered by the policy; but the exception may be so framed as to exclude liability even where the excepted peril is the remote cause of the loss⁸.

1 As to loss caused by the explosion see PARAS 600-602 ante.

2 *Langdale v Mason* (1780) 2 Marshall on Marine Insurances (3rd Edn) 793; *Stanley v Western Insurance Co* (1868) LR 3 Exch 71; *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57, [1973] 3 All ER 825, CA.

3 *Rogers v Whittaker* [1917] 1 KB 942; cf *Curtis & Sons v Mathews* [1919] 1 KB 425, CA. As to the exception of military and usurped power see PARA 599 ante.

4 *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57, [1973] 3 All ER 825, CA.

5 Cf *Marsden v City and County Assurance Co* (1865) LR 1 CP 232; *Winicofsky v Army and Navy General Assurance Association Ltd* (1919) 35 TLR 283.

6 A shift of the wind changing the direction of the fire is a natural cause and not the intervention of a fresh cause: *Tootal Broadhurst Lee Co v London and Lancashire Fire Insurance Co* (1908) Times, 21 May, PC, per Bigham J.

7 *Walker v London and Provincial Insurance Co* (1888) 22 LR Ir 572; *Tootal Broadhurst Lee Co v London and Lancashire Fire Insurance Co* (1908) Times, 21 May, PC, per Bigham J.

8 *Walker v London and Provincial Insurance Co* (1888) 22 LR Ir 572 at 577, per Palles CB; *Tootal Broadhurst Lee Co v London and Lancashire Fire Insurance Co* (1908) Times, 21 May, PC, per Bigham J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/A. IN GENERAL/606. Insurable interest necessary.

(iv) Insurable Interest

A. IN GENERAL

606. Insurable interest necessary.

A contract of fire insurance, like all other contracts of insurance¹, requires an insurable interest in the subject matter of the insurance to support it²; in the absence of an insurable interest, the insured can suffer no loss, and the contract becomes a mere wager³.

1 The marine insurance definition of 'insurable interest' applies also to fire insurance: *Castellain v Preston* (1883) 11 QBD 380 at 397, CA, per Bowen LJ. As to insurable interest in marine insurance (and generally) see PARA 366 ante.

2 *Thomas v National Farmers' Union Mutual Insurance Society Ltd* [1961] 1 All ER 363, [1961] 1 WLR 386; and see *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, HL; *Sadlers' Co v Badcock* (1743) 2 Atk 554; *Castellain v Preston* (1883) 11 QBD 380, CA.

3 *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/A. IN GENERAL/607. Interests which are insurable.

607. Interests which are insurable.

The precise nature, extent or value of the insurable interest in a contract of insurance is irrelevant¹. An equitable or beneficial interest of any kind is as effective for this purpose as a legal interest². Interest is not restricted to ownership³; it may arise under a contract relating to the subject matter⁴ or it may be founded upon lawful possession⁵; a finder who takes the object which he finds into his possession has an insurable interest in it⁶. Similarly a defeasible or precarious interest is capable of supporting an insurance⁷.

It is not clear whether the statutory provisions which require the names of persons interested to be inserted in policies⁸ apply to fire insurance⁹.

1 As to the requirement of an insurable interest see PARA 606 ante.

2 *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ. Both trustees and beneficiaries have an insurable interest in the trust property: *Ex p Yallop* (1808) 15 Ves 60 at 67; *Ex p Houghton* (1810) 17 Ves 251 at 253. As to the duties and powers of trustees in respect of insurance see the Trustee Act 1925 s 19 (as substituted); and SETTLEMENTS vol 42 (Reissue) PARA 940; TRUSTS vol 48 (2007 Reissue) PARAS 1047-1048.

3 If a person is owner he need not be in possession: *Ward v Carttar* (1865) LR 1 Eq 29 at 31 per Romilly MR. See also *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All ER 487, [1996] 1 Lloyd's Rep 614, CA, where property developers were held to have no interest in architects' drawings.

4 As to an interest founded on contract see PARA 612 post. See also *Sellers v Continental Insurance Co* (1974) 48 DLR (3d) 369, NS App Div, where the insured had built his house at his own expense and had a contractual right to acquire the land; he was held to be correctly described as 'owner' and to have an insurable interest in the house.

5 *Marks v Hamilton* (1852) 7 Exch 323. However, a person who merely permits the property of another to remain on his land has no insurable interest in it: *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 628, HL, per Lord Buckmaster.

6 *Marks v Hamilton* (1852) as reported in 21 LJEx 109 at 110 per Pollock CB.

7 *Goulstone v Royal Insurance Co* (1858) 1 F & F 276; *Anderson v Commercial Union Assurance Co* (1885) 55 LQB 146, CA; see also *Marks v Hamilton* (1852) 7 Exch 323.

8 Ie the Life Assurance Act 1774 s 2 (as amended): see PARA 543 ante.

9 If the statute has any application to fire insurance, it can apply to insurances on buildings only, since insurances on goods are expressly excluded: *ibid* s 4. In practice, the statute, in so far as it requires the names of the persons interested to be inserted in the policy (see s 2 (as amended); and PARA 543 ante), is not always observed in connection with insurances on buildings and the application of the statute to such insurances is open to question. It was held that s 2 did not apply to indemnity insurances in *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA; this decision was approved in *Siu Yin Kwan (Administratrix of Chan Ying Lung) v Eastern Insurance Co Ltd* [1994] 2 AC 199, [1994] 1 All ER 213, PC (employer's indemnity insurance). There are many cases in which the position under fire insurances covering interests other than that of the insured has been discussed: see eg *Rayner v Preston* (1881) 18 ChD 1, CA; *Castellain v Preston* (1883) 11 QBD 380, CA; *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190; *Matthey v Curling* [1922] 2 AC 180, CA (affd [1922] 2 AC 180 at 223, HL). It is to be noted that the mischief which the statute was intended to remedy, ie insurances without interest, did not exist in fire insurance where an insurable interest was required even before 1774: *Sadlers' Co v Badcock* (1743) 2 Atk 554 at 556 per Lord Hardwicke LG; see also *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, HL; *Dalby v India and London Life Assurance Co* (1854) 15 CB 365 at 387, Ex Ch, per Parke B.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/608. Insurable interests of vendor and purchaser.

B. INTERESTS IN PARTICULAR CASES

608. Insurable interests of vendor and purchaser.

The vendor of any property retains his insurable interest as owner until the property is conveyed to the purchaser¹. After conveyance his interest ceases unless either the purchase money is unpaid and he retains his lien as unpaid vendor², or he has undertaken to the purchaser to be responsible for the safety of the property³.

The purchaser of property acquires an insurable interest by virtue of the contract of purchase⁴.

1 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173 at 177 per Lush J; *Castellain v Preston* (1883) 11 QBD 380 at 385, CA, per Brett LJ. As to the position as between vendors and purchasers see further PARA 621 post.

2 *Castellain v Preston* (1883) 11 QBD 380 at 401, CA, per Bowen LJ.

3 *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25; cf *Martineau v Kitching* (1872) LR 7 QB 436; and see PARA 621 post.

4 See PARA 612 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/609. Bankrupt's insurable interest.

609. Bankrupt's insurable interest.

As long as he remains in possession of any of his property as apparent owner, a bankrupt retains an insurable interest in it¹ and it is immaterial that the property is being fraudulently concealed from his creditors².

1 *Marks v Hamilton* (1852) 7 Exch 323.

2 *Goulstone v Royal Insurance Co* (1858) 1 F & F 276.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/610. Spouse's insurable interest.

610. Spouse's insurable interest.

A husband has an insurable interest in his wife's property, so long as they are living together and sharing its use¹. Even in the case of property which in its nature cannot be shared, for example articles of clothing or jewellery, the husband presumably has an insurable interest if he is financially responsible for replacements. It is supposed that a wife has a similar insurable interest in property of her husband which she shares and, if she is the moneyed partner, in his personal belongings².

1 *Goulstone v Royal Insurance Co* (1858) 1 F & F 276.

2 See *Griffiths v Fleming* [1909] 1 KB 805 at 815, CA, per Vaughan Williams LJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/611. Interest founded on liability.

611. Interest founded on liability.

A person who, by the term of some contract or through a legal relationship with the owner of property, is or may become answerable for its safety, clearly has an insurable interest in the property since he is prejudiced by its destruction¹. A tenant who has covenanted to insure the demised premises retains an insurable interest in them, even after his tenancy has come to an end, if his liability under the covenant continues². Similarly, liability under a covenant to make good fire damage confers an interest on a tenant³. Again, by reason of their liability under the policy, insurers under a fire insurance policy have themselves a sufficient insurable interest in the property of the insured which is the subject matter of the insurance to support a policy of reinsurance⁴.

1 *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA, where liability was restricted to claims against the insured as occupier of premises; cf *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All ER 487, [1996] 1 Lloyd's Rep 614, CA, where property developers were held not to have an interest in architects' drawings. As to the position of bailees see PARA 698 post; and BAILMENT vol 3(1) (2005 Reissue) PARA 44.

2 *Heckman v Isaac* (1862) 6 LT 383. However, when his liability comes to an end, his insurable interest ceases (*Matthey v Curling* [1922] 2 AC 180 at 219, CA, per Younger LJ; affd [1922] 2 AC 180 at 223, HL) unless his occupation continues.

3 *Andrews v Patriotic Insurance Co (No 2)* (1886) 18 LR Ir 355 at 365 per Palles CB.

4 *Forsikringsaktieselskabet National (of Copenhagen) v A-G* [1925] AC 639 at 642, HL; cf *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 631, CA, per Buckley LJ. As to the position generally of reinsurers see PARAS 385 ante, 767 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/612. Interest founded on contract.

612. Interest founded on contract.

The existence of a liability to the owner of property is not essential for founding an insurable interest¹; it is sufficient that a contract confers advantages which will be lost by the destruction of the property². A purchaser of property under a contract of sale has an insurable interest in the property derived from the contract³, which arises as soon as the contract is made⁴. Again, a bailee⁵ of property, even if he is under no liability to the bailor for the loss of the property, nevertheless has an insurable interest⁶ which, in this case, is founded upon his lien⁷, or upon the commission⁸, profit⁹ or other advantages¹⁰ which he may expect to derive from the bailment. So, too, a tenant of premises has an insurable interest founded upon the beneficial enjoyment of the premises, which he loses in the event of their destruction¹¹; and any creditor whose debt is secured by legal mortgage¹² or equitable charge upon specific property has an insurable interest in that property¹³. On the other hand, an ordinary creditor whose debt is not secured by a lien or charge of some kind upon specific property has only a personal remedy against the debtor¹⁴, and has no insurable interest in the debtor's property¹⁵.

1 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; *London and North Western Ry Co v Glyn* (1859) 1 E & E 652.

2 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618.

3 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173, as explained in *Phoenix Assurance Co v Spooner* [1905] 2 KB 753. Hence, the absence of a conveyance is immaterial: *Rayner v Preston* (1881) 18 ChD 1 at 13, CA, per James LJ; approved in *Ridout v Fowler* [1904] 1 Ch 658 at 661 per Farwell J (affd [1904] 2 Ch 93, CA).

4 The purchase may be on approval: *Bevington and Morris v Dale & Co Ltd* (1902) 7 Com Cas 112 at 113 per Kennedy J.

5 As to insurance by bailees see PARAS 698-705 post.

6 See the text to note 1 supra.

7 *Crowley v Cohen* (1832) 3 B & Ad 478.

8 *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ.

9 *Dalglish v Buchanan* (1854) 16 Durl 332, Ct of Sess.

10 Thus a person who rents a house furnished has an insurable interest in the furniture: *Trotter v Watson* (1869) LR 4 CP 434 at 444 per Bovill CJ.

11 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618 at 628 per Wood V-C; *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ.

12 A legal mortgagee has an insurable interest based on legal ownership: *Dobson v Land* (1850) 8 Hare 216 at 220 per Wigram V-C; *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583, CA, per Mellish LJ; *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ. As to the power of a mortgagee to insure see MORTGAGE vol 77 (2010) PARA 102.

13 *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 708, HL, per Lord Halsbury LC.

14 Hence he has an insurable interest in the life of his debtor: see PARA 540 ante.

15 *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 626, HL, per Lord Buckmaster, approving *Moran, Galloway & Co v Uzielli* [1905] 2 KB 555 at 562.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/B. INTERESTS IN PARTICULAR CASES/613. Shareholder in company.

613. Shareholder in company.

A shareholder in a company, even though the company is a one-man company and he and his nominees are the only shareholders, has no insurable interest in the company's property¹; nor has a creditor of a company any insurable interest in its property².

1 *Macaura v Northern Assurance Co Ltd* [1925] AC 619, HL. For the principle that a company is a legal person separate from its members see COMPANIES vol 14 (2009) PARA 120.

2 *Macaura v Northern Assurance Co Ltd* [1925] AC 619, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/C. INSURANCE OF SEPARATE INTERESTS/614. Persons interested in same property.

C. INSURANCE OF SEPARATE INTERESTS

614. Persons interested in same property.

There are many cases in which two or more persons, such as landlord and tenant¹, bailor and bailee², mortgagor and mortgagee³ and tenant for life and remainderman⁴, each have an interest in the same property. These interests are separate and distinct; each is capable of supporting an insurance and each of the two persons interested may insure the property for his own protection. The insurance so effected enures for the sole benefit of the person effecting it and the other persons interested in the property have no right to participate⁵.

1 *Andrews v Patriotic Assurance Co (No 2)* (1886) 18 LR Ir 355; *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA.

2 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL. As to insurance by bailees see PARAS 698-705 post. As to owner and hirer under a hire purchase contract see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 25-27.

3 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583, CA, per Mellish LJ. The same principle applies as regards first and second mortgagees: *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699, HL.

4 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 577, CA, per Jessel MR.

5 *Leeds v Cheetham* (1827) 1 Sim 146, followed in *Lofft v Dennis* (1859) 1 E & E 474; *Warwicker v Bretnall* (1882) 23 ChD 188, explaining *Rook v Worth* (1750) 1 Ves Sen 460; *Gaussen v Whatman* (1905) 93 LT 101; *Re Bladon, Dando v Porter* [1911] 2 Ch 350 at 354 per Neville J (on appeal [1912] 1 Ch 45, CA).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/C. INSURANCE OF SEPARATE INTERESTS/615. Insurances for the benefit of several interests.

615. Insurances for the benefit of several interests.

Since it is the same property which is exposed to peril, a composite policy is sometimes taken out by two or more persons for their respective rights and interests. In such a case the policy is not a joint policy, so as to involve all participants in a fraud perpetrated by one of them; each participant has his separate rights under the policy, and these are not prejudiced by another participant's fraud¹. Warehousemen and other bailees effect policies which will enure for the benefit of their bailors² and similar insurances are effected by mortgagors or mortgagees³, tenants for life or remaindermen⁴, lessors or lessees⁵, and a company, its contractors and subcontractors⁶, for the benefit of other persons interested in the same property. Insurances of this latter kind may be made in the performance of some contract or in the discharge of some duty⁷, although this is not necessary. The person effecting the insurance need owe no duty or responsibility to the other persons interested⁸. All that is required to make the insurance effective is that, at the time of insuring, it is his intention to cover their interests as well as his own⁹. The intention must be that of the party to the insurance contract; the intention of the broker who places the business is irrelevant unless he has authority to act for all the interests concerned¹⁰. If the requisite intention is established, the insurance is a valid insurance enuring for the benefit of all persons interested¹¹. The person effecting it must be regarded as effecting it as agent on their behalf. Therefore, if the insurance is unauthorised it must be ratified by the person claiming its benefit and the ratification may be given after loss¹².

1 *General Accident, Fire and Life Assurance Corp'n Ltd v Midland Bank Ltd* [1940] 2 KB 388, [1940] 3 All ER 252, CA; *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24, [1996] CLC 1728, CA. On its terms, a contractors' all risks policy may be considered as meaning that each participant is insured for the whole risk: *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, [1983] 3 All ER 35.

2 *Martineau v Kitching* (1872) LR 7 QB 436 at 458 per Blackburn J; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *Lombard Australia Ltd v NRMA Insurance Ltd* [1969] 1 Lloyd's Rep 575, NSW CA; and see further PARA 698 post.

3 *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190, Ct of Sess; more fully reported in 14 R 1094.

4 *Garden v Ingram* (1852) 23 LJCh 478 at 479; *Castellain v Preston* (1883) 11 QBD 380 at 399 et seq, CA, per Bowen LJ.

5 *Enlayde Ltd v Roberts* [1917] 1 Ch 109 at 117 per Sargant J; *Matthey v Curling* [1922] 2 AC 180 at 199, CA, per Atkin LJ (affd [1922] 2 AC 180 at 223, HL).

6 *Commonwealth Construction Co Ltd v Imperial Oil Ltd and Wellman-Lord (Alberta) Ltd* (1976) 6 WWR 72, Can SC (subcontractor had insurable interest only in that part of project for which it was the subcontractor); *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, [1983] 3 All ER 35 (contractors' all risks insurance). See also *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep 578, CA.

7 *Martineau v Kitching* (1872) LR 7 QB 436; *Reynard v Arnold* (1875) 10 Ch App 386, CA; see also *Garden v Ingram* (1852) 23 LJCh 478 at 479; explained in *Lee v Whiteley* (1866) LR 2 Eq 143 at 149; and *Rayner v Preston* (1881) 18 ChD 1 at 7, CA.

8 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; *London and North Western Ry Co v Glyn* (1859) 1 E & E 652.

9 *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ; see also *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; *London and North Western Ry Co v Glyn* (1859) 1 E & E 652; *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 TLR 190; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC

451, [1966] 1 All ER 418, HL. As to whether the Life Assurance Act 1774 applies to such insurances in the case of buildings see PARA 607 note 9 ante.

10 *Graham Joint Stock Shipping Co Ltd v Merchant Marine Insurance Co Ltd (No 2)* [1924] AC 294, HL.

11 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870 at 881 per Lord Campbell CJ; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] 1 All ER 418, HL.

12 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870 at 881 per Lord Campbell CJ. In this case the rule is the same as in the case of marine insurance: see PARA 388 ante. As to ratification see generally AGENCY vol 1 (2008) PARA 57 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/C. INSURANCE OF SEPARATE INTERESTS/616. Insurances by persons without interest.

616. Insurances by persons without interest.

A person who has himself no insurable interest in the property cannot insure it for his own benefit, but he may insure it on behalf of some person who has an insurable interest. Then if ratification is necessary, owing to the absence of any antecedent authority, it must be given before loss; ratification after loss comes too late¹.

¹ *Grover and Grover Ltd v Mathews* (1910) 15 Com Cas 249; followed in *Ferguson v Aberdeen Parish Council* 1916 SC 715.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/D. DESCRIPTION OF INTEREST/617. Description of interest not generally required.

D. DESCRIPTION OF INTEREST

617. Description of interest not generally required.

As a general rule, it is unnecessary for the insured to describe the nature or extent of his interest in the subject matter of insurance¹. The description of the subject matter sufficiently covers any interest which he may have. A bailee of goods need not describe the nature of his interest or state that he is bailee; an insurance on 'goods' covers his interest as bailee even though he may be intending to cover interests other than his own².

¹ *London and North Western Ry Co v Glyn* (1859) 1 E & E 652 at 664 per Crompton J. For the terms commonly used to describe the goods insured by a bailee's policy see PARAS 701-704 post.

² See *London and North Western Ry Co v Glyn* (1859) 1 E & E 652 at 664 per Crompton J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/D. DESCRIPTION OF INTEREST/618. Conditions requiring description of interest.

618. Conditions requiring description of interest.

The policy may contain a condition requiring a description of the interest intended to be insured, such as a condition that goods held in trust or on commission¹ are not to be covered by the policy unless specially mentioned as insured. Such a condition has no application unless the bailee intends to cover the interest of the bailor as well as his own; a specific description is not required where the policy is intended to cover the proposer's interest only².

1 As to the meaning of 'goods held in trust or on commission' see PARAS 701-703 post.

2 *London and North Western Ry Co v Glyn* (1859) 1 E & E 652 at 664. For phrases usually used to describe the goods insured by a bailee's policy see PARAS 701-704 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/619. Assignment by operation of law.

E. ASSIGNMENT OF INTEREST

619. Assignment by operation of law.

On the death or bankruptcy of the insured, his insurable interest in his property is assigned by operation of law to his personal representatives¹ or trustee in bankruptcy². The assignment of his interest does not affect the validity of the policy which remains enforceable by, respectively, the personal representatives³ or the trustee in bankruptcy⁴.

¹ As to the effect of death on the policy see PARAS 143, 152 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 761 et seq.

² As to the effect of bankruptcy on the policy see PARA 153 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 420.

³ *Doe d Pitt v Laming* (1814) 4 Camp 73 at 75 per Lord Ellenborough CJ. See also *Mildmay v Folgham* (1797) 3 Ves 471.

⁴ *Manchester Fire Insurance Co v Wykes* (1875) 33 LT 142. See also *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186, CA; and *Marriage v Royal Exchange Assurance Co* (1849) 18 LJCh 216.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/620. Voluntary assignment.

620. Voluntary assignment.

Where the assignment of interest in the subject matter is effected by the voluntary act of the insured, the insured divests himself of his interest in the subject matter¹ and the policy accordingly ceases to be effective unless it is specifically and validly assigned as a policy².

¹ *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173 at 177 per Lush J.

² *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25; *Ecclesiastical Comrs for England v Royal Exchange Assurance Corp*n (1895) 11 TLR 476; *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 48 TLR 17, HL. See PARAS 623-624 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/621. Assignment must be complete.

621. Assignment must be complete.

To constitute an assignment of interest, the insured must have parted with all his interest in the subject matter¹. So long as he retains any interest in the subject matter, the assignment of interest is not complete, and the policy remains effective². In the case of a sale, if the property in the subject matter has passed to the purchaser and the price has been paid, the vendor's insurable interest ceases³. However, the mere fact that a contract of sale has been made does not divest the vendor of his interest, even though, as between him and the purchaser, the risk may have passed to the purchaser⁴. The vendor retains his insurable interest as legal owner⁵, and he has a further interest in that the purchaser may refuse to complete the purchase⁶. Consequently, if a fire takes place before the purchase is completed and the price is paid, the vendor is entitled to enforce his policy and to receive payment of the insurance money⁷. Notwithstanding the execution of a conveyance and the consequent passing of the legal estate to the purchaser, the vendor may retain a lien for the unpaid price and it seems that this will be sufficient to keep the policy in force⁸. The vendor also retains an insurable interest if he undertakes to the purchaser to be responsible for the safety of the subject matter⁹.

1 *Rayner v Preston* (1881) 18 ChD 1 at 7, CA, per Cotton LJ.

2 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173.

3 *Martineau v Kitching* (1872) LR 7 QB 436; *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25.

4 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173, as explained in *Phoenix Assurance Co v Spooner* [1905] 2 KB 753, CA.

5 As to the insurable interest of the vendor see PARA 608 ante.

6 See *Castellain v Preston* (1883) 11 QBD 380 at 385, CA, per Brett LJ. In such a case, if certain statutory conditions are fulfilled, the insurance money must on completion be paid over by the vendor to the purchaser: see PARA 625 post. In a case where the insurance money is not payable over to the purchaser, if the vendor ultimately receives the purchase price from the purchaser, the insurers are entitled to recover from the vendor a sum equal to the insurance money: see PARA 198 ante.

7 *Collingridge v Royal Exchange Assurance Corp*n (1877) 3 QBD 173.

8 *Castellain v Preston* (1883) 11 QBD 380 at 401, 405, CA, per Bowen LJ.

9 *Martineau v Kitching* (1872) LR 7 QB 436.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/622. Change of interest.

622. Change of interest.

A change of interest is not equivalent to an assignment of interest; the creation of a mortgage or charge does not operate as an assignment of interest, and the policy remains effective¹; and on a change of partnership, where the continuing partners retain their insurable interest in the partnership property, an insurance on the property is not affected².

1 *Garden v Ingram* (1852) 23 LJCh 478 at 479 per Lord St Leonards.

2 *Jenkins v Deane* (1933) 150 LT 314.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/623. Policy must be assigned specifically.

623. Policy must be assigned specifically.

A policy of insurance is a contract personal to the insured; it is not annexed to his property, and even where it insures a building, it is not, apart from statute¹, a contract which runs with the land². Consequently, on the assignment of the subject matter, the policy does not pass to the assignee by virtue of the assignment³; it must be specifically dealt with in accordance with certain precise rules⁴.

1 For the statutory provision by which insurance money received by a vendor is payable by the vendor to the purchaser see PARA 625 post.

2 *Rayner v Preston* (1881) 18 ChD 1 at 11, CA, per Brett LJ; *Phoenix Assurance Co v Spooner* [1905] 2 KB 753 at 756, CA, per Bigham J.

3 *Mildmay v Folgham* (1797) 3 Ves 471 at 473 per Lord Loughborough LC; *Paine v Meller* (1801) 6 Ves 349 at 351 per Lord Eldon LC; *Poole v Adams* (1864) 33 LJCh 639; and see *Edwards v West* (1878) 7 ChD 858.

4 See *Rayner v Preston* (1881) 18 ChD 1, CA; and PARA 624 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/624. Rules for assignment of fire policy.

624. Rules for assignment of fire policy.

To constitute a valid assignment of a fire policy¹ there are three conditions to be fulfilled. First, the assignment of the policy must accompany the assignment of the subject matter². Secondly, the consent of the insurers to the assignment must be obtained. This is necessary because the assignment is, in effect, the substitution of a new insured, and the contract is purely a personal contract between the insurers and a particular insured³. Thirdly, if the policy prescribes a procedure for obtaining consent, that procedure must be followed⁴.

1 This must be distinguished from the assignment of the insured's right to receive the proceeds of the policy, which is the assignment not of the contract of insurance but of the debt arising under the contract, and is therefore the assignment of an ordinary chose in action: see *Randall v Lithgow* (1884) 12 QBD 525, DC; *Green v Brand* (1884) Cab & El 410; *English and Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700, CA (assignments after loss); *London Investment Co v Montefiore* (1864) 9 LT 688; *Bank of Toronto v St Lawrence Fire Insurance Co* [1903] AC 59, PC (assignments before loss); *Tallinna Laevauhisus AS v Estonian State Steamship Line* (1946) 80 Ll L Rep 99; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145 at 151, [1954] 1 WLR 139 at 143; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987, [1995] 1 WLR 1140, PC. As to assignment of choses in action see CHOSSES IN ACTION vol 13 (2009) PARA 14 et seq.

2 The assignment of the policy may be evidence of an assignment of interest: *Doe d Pearson v Ries and Knapp* (1832) 8 Bing 178 at 185. As to the necessity for the assignment of interest and of the policy being contemporaneous see PARA 389 ante.

3 *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, HL; *Sadlers' Co v Badcock* (1743) 2 Atk 554.

4 *Wilkinson v Coverdale* (1793) 1 Esp 74. This is usually by memorandum signed by or on behalf of the insurers.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(iv) Insurable Interest/E. ASSIGNMENT OF INTEREST/625. Preservation of vendor's insurance for benefit of purchaser.

625. Preservation of vendor's insurance for benefit of purchaser.

At common law, if property subject to a contract for sale is damaged or destroyed in the interval between the signing of the contract and completion of the sale, the purchaser is not entitled to claim the benefit of any insurance policy effected by the vendor, unless the benefit of the policy has been duly assigned to the purchaser by the contract and the insurers have consented¹; nor, in general, is the vendor bound to keep the policy alive or to inform the purchaser of its lapse². However, it may be a term of a contract of sale that the vendor's policy is to be kept in force for the benefit of the purchaser³.

It is provided by statute that where after the date of any contract for the sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property⁴ included in the contract, on completion of the contract the money must be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or as soon afterwards as the money is received by the vendor⁵, subject to the fulfilment of three conditions, namely that:

- 156 (1) there is no stipulation to the contrary in the contract⁶;
- 157 (2) the consent of the insurers, if required, is obtained⁷; and
- 158 (3) the purchaser pays the proportionate part of the premium from the date of the contract⁸.

1 As to assignment of the policy see PARAS 623-624 ante. As to the vendor's right to enforce the policy see PARA 621 ante.

2 *Paine v Meller* (1801) 6 Ves 349; *Dowson v Solomon* (1859) 1 Drew & Sm 1 at 12. Where, however, the property is leasehold and the vendor lessee has covenanted with the lessor to insure, the omission of the vendor to keep the property insured may be a defect in his title: *Palmer v Goren* (1856) 4 WR 688; see also *Dowson v Solomon* supra (where the vendor lessee renewed the insurance so as to keep the property covered up to the contractual date for completion, but completion having been delayed, the property became uninsured, and, although the vendor subsequently renewed the insurance and obtained from the lessor a waiver of the forfeiture incurred by the lapse of the insurance, the court refused to decree specific performance against the purchaser); *Newman v Maxwell* (1899) 80 LT 681 (a case of a contract by a lessor for the purchase of the lessee's interest).

3 See *Rayner v Preston* (1881) 18 ChD 1 at 6, CA, per James LJ; *Poole v Adams* (1864) 12 WR 683 per Kindersley V-C; see also *Martineau v Kitching* (1872) LR 7 QB 436.

4 'Property' includes any thing in action and any interest in real or personal property: Law of Property Act 1925 s 205(1)(xx).

5 Ibid s 47(1); and see PARA 198 ante.

6 Ibid s 47(2)(a).

7 Ibid s 47(2)(b).

8 Ibid s 47(2)(c). These provisions apply, with modifications, to sales or exchanges by order of the court: see s 47(3).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/626. No recovery beyond the sum insured.

(v) The Amount Recoverable

626. No recovery beyond the sum insured.

A fire policy always specifies the sum insured, which merely represents the maximum sum for which the insurers accept liability. Unless the policy is a valued policy¹, the insured does not, in the event of a loss, become entitled to be paid the sum insured as a matter of course². What he is entitled to is a full indemnity within the limits of the policy³. He cannot recover more than the sum insured, even though the amount of the loss exceeds it, and he cannot recover even the sum insured, unless he proves a loss to that amount⁴.

1 As to the assessment of partial loss under a valued policy see *Elcock v Thomson* [1949] 2 KB 755, [1949] 2 All ER 381, CA. Valued policies are not often used in fire insurance.

2 *Chapman v Pole, PO* (1870) 22 LT 306 at 307 per Cockburn CJ; *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 711, HL, per Lord Selborne; see also *Vance v Forster* (1841) 1r Cir Rep 47 at 50 per Pennefather B.

3 *Castellain v Preston* (1883) 11 QBD 380 at 401, CA, per Bowen LJ; *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699, HL; *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 22, 440 (old maltings); *Pleasurama Ltd v Sun Alliance and London Insurance Ltd* [1979] 1 Lloyd's Rep 389 (bingo hall); *Leppard v Excess Insurance Co Ltd* [1979] 2 All ER 668, [1979] 1 WLR 512, CA (cottage); *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* [1983] 1 Lloyd's Rep 674 (on appeal [1984] 1 Lloyd's Rep 149, CA) (bingo hall).

4 *Vance v Forster* (1841) 1r Cir Rep 47. As to the reduction of the amount which would be otherwise payable by virtue of the operation of average and contribution clauses see PARAS 210, 213 ante. As to reinstatement see PARAS 632-633 post. As to the taxation of chargeable gains see the Taxation of Chargeable Gains Act 1992 s 205; and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARAS 36, 386.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/627. Measure of indemnity.

627. Measure of indemnity.

The insured is not fully indemnified unless, so far as money can do it, he is restored to the position existing at the time of the fire. The amount recoverable must therefore be measured by the amount of his loss, that is to say, by the value which the fire has taken away from his property¹.

¹ *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 704, HL, per Lord Selborne.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/628. Valuation of total loss.

628. Valuation of total loss.

In the case of a total loss, the measure of indemnity must necessarily be the value of the property destroyed¹, up to the limit of the sum insured². For the purpose of ascertaining this value, the rules set out below may be applied.

- 159 (1) The value to be taken is the value of the physical property destroyed; no allowance is made for loss of prospective profits or other consequential loss³.
- 160 (2) The value is the intrinsic value of the property⁴ to the insured⁵, its real and actual value⁶; no allowance is to be made for mere sentimental value⁷.
- 161 (3) The value is the value at the time of the fire⁸. This is generally in accordance with the express undertaking of the insurers in the policy⁹. Therefore, if the value has increased during the period of insurance, and at the time of the fire exceeds the value at the commencement of the risk, the insured is entitled to recover on the basis of the increased value¹⁰.
- 162 (4) The value is the value at the place of the fire¹¹.

¹ *Chapman v Pole, PO* (1870) 22 LT 306 at 307 per Cockburn CJ; see also *Hercules Insurance Co v Hunter* (1836) 14 Sh 1137 at 1142, Ct of Sess, per Lord Moncreiff.

² As to the limit of the sum insured see PARA 626 text and note 4 ante.

³ *Re Wright and Pole* (1834) 1 Ad & El 621; see further PARA 604 ante. It follows that future expenses in relation to a building which would have been incurred but for its destruction by fire, are not to be taken into consideration: *Maurice v Goldsborough, Mort & Co Ltd* [1939] AC 452, [1939] 3 All ER 63, PC. As to consequential loss insurance see PARAS 800-804 post.

⁴ *Hercules Insurance Co v Hunter* (1836) 14 Sh 1137, Ct of Sess.

⁵ See eg *The Harmonides* [1903] P 1.

⁶ *Chapman v Pole, PO* (1870) 22 LT 306.

⁷ *Re Earl of Egmont's Trusts, Lefroy v Earl of Egmont* [1908] 1 Ch 821 at 826 per Warrington J.

⁸ *Chapman v Pole, PO* (1870) 22 LT 306; *Phoenix Assurance Co v Spooner* [1905] 2 KB 753 at 756, CA, per Bigham J; see also *Re Wilson and Scottish Insurance Corp* [1920] 2 Ch 28; *Vance v Forster* (1841) 1r Cir Rep 47; *Hercules Insurance Co v Hunter* (1836) 14 Sh 1137, Ct of Sess.

⁹ The rule differs from that applicable in the case of marine insurance: see PARA 432 ante.

¹⁰ *Re Wilson and Scottish Insurance Corp* [1920] 2 Ch 28. However, this does not allow recovery of more than the sum insured: see the text to note 2 supra; and PARA 626 ante.

¹¹ *Rice v Baxendale* (1861) 7 H & N 96 at 101 per Bramwell B.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/629. Market value as basis.

629. Market value as basis.

Prima facie, the value of property destroyed is measured on the basis of market value. This clearly represents an adequate indemnity where, as in the case of goods or stock-in-trade, the property destroyed is a marketable commodity, since payment of the market value will enable the insured to go into the market and, by the purchase of similar property, be restored to his original position. However, the basis of market value cannot be applied in every case; the market value does not necessarily represent the real value of the property and payment of the market value may not adequately indemnify the insured for what he has lost¹. This is particularly the case where the property was held by the insured, not for the purpose of placing it upon the market, but for his own use or enjoyment, or for the purpose of carrying on his business². The insured cannot continue the use or enjoyment or carry on his business unless the property is reinstated, and the cost of reinstatement may be considerably in excess of the market value. There are also cases in which property, such as a church, has no market value at all and where there can be no restoration to the original position unless the property is reinstated. In such cases the amount recoverable is based on the cost of reinstatement³.

1 *Castellain v Preston* (1883) 11 QBD 380 at 400-401, CA, per Bowen LJ; *Quorum AS v Schramm* [2002] 2 All ER (Comm) 147, [2002] 1 Lloyd's Rep 249 in which it was held that where there were two relevant markets for assessing the value of damage to a Degas pastel the court should have regard to the market in which it was likely that the higher price would be obtained.

2 *Grant v Aetna Insurance Co* (1862) 15 Moo PCC 516 at 518-519; *Castellain v Preston* (1883) 11 QBD 380, CA; see also *Vance v Forster* (1841) 1r Cir Rep 47.

3 *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 713, HL, per Lord Selborne; see also *Andrews v Patriotic Assurance Co (No 2)* (1886) 18 LR 1r 355 at 366 per Pales CB. Some allowance may have to be made for 'new for old': *Vance v Forster* (1841) 1r Cir Rep 47; *Ewer v National Employers' Mutual General Insurance Association Ltd* [1937] 2 All ER 193. But there is no certain standard such as exists in marine insurance: see PARA 449 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/630. Valuation of partial loss.

630. Valuation of partial loss.

Where the loss is partial only, it can usually be made good by repairing the damage to the property, and the amount recoverable is based on the cost of repairs¹. If the policy is a valued policy the amount recoverable is such proportion of the agreed value as is represented by the depreciation in the actual value².

¹ *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287 at 295, Ct of Sess, per Lord Craighill.

² *Elcock v Thomson* [1949] 2 KB 755, [1949] 2 All ER 381. See also PARA 626 note 1 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(v) The Amount Recoverable/631. Recovery by person with limited interest.

631. Recovery by person with limited interest.

The insured cannot usually recover more than the value of his interest in the property insured¹. To entitle him to the full value of the property he must be interested to the full amount²; if he has only a limited or partial interest he can recover the value of his interest and no more³. The full value of the property is recoverable where the insurance was intended to enure for the benefit of all persons interested in the property⁴.

1 *Castellain v Preston* (1883) 11 QBD 380 at 397, CA, per Bowen LJ.

2 A mortgagor can recover the full value, notwithstanding the existence of the mortgage: *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583, CA, per Mellish LJ. As to bailees see further PARAS 698-705 post.

3 *Castellain v Preston* (1883) 11 QBD 380, CA. Where the different interests are separately insured, the result may be that in the aggregate the amounts paid under the different policies exceed the value of the property: *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699, HL.

4 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; see generally para 615 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/A. REINSTATEMENT GENERALLY/632. Meaning of 'reinstatement'.

(vi) Reinstatement

A. REINSTATEMENT GENERALLY

632. Meaning of 'reinstatement'.

'Reinstatement' means the restoration of property affected by a fire to the condition in which it was before the fire; in the case of a total loss by rebuilding the building or replacing the goods by their equivalent, as the case may be, and in the case of a partial loss by repairing the damage¹.

¹ *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146 at 148, CA, per Lord Esher MR; cf *Sutherland v Sun Fire Office* (1852) 14 Dunl 775 at 778, Ct of Sess. See further *Beaumont v Humberts* [1990] 49 EG 46, CA, where a valuer's reinstatement value, which was based on reconstruction in the same style and general shape, but redesigned in parts according to modern practice, was not negligent although it did not provide for an exact or nearly exact copy of the original house.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/A. REINSTATEMENT GENERALLY/633. Rights and obligations as to reinstatement.

633. Rights and obligations as to reinstatement.

The duty of reinstating the property is in certain cases imposed upon the insurers by statute¹. In other cases, the policy usually gives the insurers an option to reinstate but, unless the policy so provides², the obligation of the insurers is to pay money only³ and they cannot, without the consent of the insured, substitute a different method of performing their obligation and insist upon reinstating the property⁴. Similarly, on receiving the insurance money, the insured may do what he likes with it⁵ and he cannot be required to expend it on reinstatement unless the obligation to do so is imposed on him by statute⁶ or the terms of a contract⁷.

1 As to reinstatement under statute see PARAS 637-639 post.

2 As to the option as to reinstatement see PARA 634 post.

3 *Rayner v Preston* (1881) 18 ChD 1 at 9, CA, per Brett LJ.

4 *Times Fire Assurance Co v Hawke* (1859) 28 LJEx 317 at 318 per Bramwell B; affd (1859) 28 LJEx 317.

5 *Rayner v Preston* (1881) 18 ChD 1 at 6, CA, per Cotton LJ; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 639, CA, per Kennedy LJ.

6 See eg the Trustee Act 1925 s 20(4) (see TRUSTS vol 48 (2007 Reissue) PARA 1048); the Law of Property Act 1925 s 108(3) (see MORTGAGE vol 77 (2010) PARA 199); the Ecclesiastical Houses of Residence Act 1842 s 11 (as amended), and the Repair of Benefice Buildings Measure 1972 s 12(3) (as amended) (see ECCLESIASTICAL LAW vol 14 para 1182).

7 Such contracts are frequently made between lessors and lessees and between mortgagors and mortgagees: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 536; MORTGAGE vol 77 (2010) PARAS 199, 227. If the money is paid to the insured by the insurers on his express promise to expend it in reinstatement, he is bound by his promise: *Queen Insurance Co v Vey* (1867) 16 LT 239.

UPDATE

633 Rights and obligations as to reinstatement

TEXT AND NOTES--Under an insurance policy, an insurer is not obliged to reinstate the property where minor or significant changes to improve the building have been made to the scheme presented to the insurers: *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2006] 2 All ER (Comm) 550.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/B. REINSTATEMENT UNDER THE POLICY/634. Option as to reinstatement.

B. REINSTATEMENT UNDER THE POLICY

634. Option as to reinstatement.

By the form of policy in general use, the insurers reserve to themselves the option of reinstating the property instead of making payment in money. This option is reserved for the insurers' benefit, and it is for them to elect whether to reinstate; the insured is not entitled to require them to reinstate¹. Nor may he prevent them from reinstating if they elect to do so².

1 *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146 at 149, CA, per Bowen LJ.

2 *Bisset v Royal Exchange Assurance Co* (1821) 1 Sh 174, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/B. REINSTATEMENT UNDER THE POLICY/635. Exercise of option to reinstate.

635. Exercise of option to reinstate.

An election for or against reinstatement is final once it is made, and cannot afterwards be withdrawn¹. No formal election is necessary; an election by conduct is sufficient, provided that the conduct is clear and unequivocal. The insurers will be taken to have elected against reinstatement and in favour of a payment in money if the negotiations for a settlement have been conducted by the insurers throughout on the footing that the loss is to be made good by a payment in money², or if they have proceeded to arbitration for the purpose of ascertaining the amount to be paid under the policy³. On the other hand, they are not bound, in the absence of specific provision, to exercise the option immediately⁴; they are entitled before exercising it to investigate the loss and to ascertain what its amount is likely to be. Therefore a merely provisional assessment of the amount, even if made in conjunction with the insured, does not debar them from electing to reinstate⁵.

1 *Sutherland v Sun Fire Office* (1852) 14 Dunl 775, Ct of Sess.

2 *Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287, Ct of Sess.

3 *Sutherland v Sun Fire Office* (1852) 14 Dunl 775 at 777, Ct of Sess, per Lord Anderson.

4 A time may, however, be specified within which the option is to be exercised: *Bisset v Royal Exchange Assurance Co* (1821) 1 Sh 174, Ct of Sess.

5 *Sutherland v Sun Fire Office* (1852) 14 Dunl 775 at 777, Ct of Sess, per Lord Anderson.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/B. REINSTATEMENT UNDER THE POLICY/636. Effect of election to reinstate.

636. Effect of election to reinstate.

If the insurers do not elect to reinstate, their obligation to make good the loss by a payment in money continues¹; but if they do elect, the obligation ceases and the contract becomes a contract to reinstate². In the case of a building this contract is sufficiently performed if the building is put substantially into the same state as before the fire³. But the insurers are in breach of contract, for which they are liable in damages, if the reinstated building differs materially from the original building⁴ or if it proves defective through bad workmanship and has to be rebuilt by the insured⁵. They are also in breach if they fail to reinstate and it is no defence that the reinstatement would cost much more to carry out than they had anticipated at the time they elected⁶ or even that reinstatement had become impossible⁷. If they commit a breach of contract in either way, the damages which may be awarded against them are not necessarily limited to the amount which would have been payable under the policy if they had elected to make a payment in money⁸.

1 *Rayner v Preston* (1881) 18 ChD 1, CA.

2 *Brown v Royal Insurance Co* (1859) 1 E & E 853 at 858 per Lord Campbell CJ.

3 *Times Fire Assurance Co v Hawke* (1858) as reported in 1 F & F 406 at 407 per Channell B; affd (1859) 28 LJEx 317. The policy usually contains a condition regulating the duties of the insurers as to reinstatement.

4 *Alchorne v Favill* (1825) 4 LJOS Ch 47. The insurers are not entitled to any allowance if the reinstated building is better than the original one: *Brown v Royal Insurance Co* (1859) 1 E & E 853 at 860 per Crompton J.

5 *Times Fire Assurance Co v Hawke* (1859) 28 LJEx 317; *Braithwaite v Employers' Liability Assurance Corp'n Ltd (James D Day Ltd, third party)* [1964] 1 Lloyd's Rep 94.

6 *Brown v Royal Insurance Co* (1859) 1 E & E 853.

7 *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146 at 150, CA, per Bowen LJ; see *Alchorne v Favill* (1825) 4 LJOS Ch 47; *Brown v Royal Insurance Co* (1859) 1 E & E 853. In the case of goods, if it is impossible to replace them in the locality which they occupied before the fire, they may be placed within a reasonable distance: *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146, CA.

8 *Times Fire Assurance Co v Hawke* (1859) 28 LJEx 317; *Brown v Royal Insurance Co* (1859) 1 E & E 853.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/C. REINSTATEMENT UNDER STATUTE/637. Statutory obligation as to reinstatement.

C. REINSTATEMENT UNDER STATUTE

637. Statutory obligation as to reinstatement.

The governors or directors of any insurance company in which any house or building¹ is insured against fire are required by statute², in case of loss or damage by fire, to reinstate it upon the request of any person interested in it or entitled to it³.

1 This provision does not apply to trade fixtures (*Re Barker, ex p Gorely* (1864) 4 De GJ & Sm 477) or to chattels (*Re Quicke's Trusts, Poltimore v Quicke* [1908] 1 Ch 887).

2 I.e. the Fires Prevention (Metropolis) Act 1774, which, despite both its short and long titles, has always been treated as applicable to the whole of England and Wales (see *Re Quicke's Trusts, Poltimore v Quicke* [1908] 1 Ch 887; *Sinnott v Bowden* [1912] 2 Ch 414, following *Re Barker, ex p Gorely* (1864) 4 De GJ & Sm 477), but it does not apply to Scotland (*Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 716, HL, per Lord Watson) or Ireland (*Andrews v Patriotic Assurance Co (No 2)* (1886) 18 LR Ir 355 at 368 per Palles CB), nor to Lloyd's underwriters (*Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601).

3 Fires Prevention (Metropolis) Act 1774 s 83, which also imposes the duty of reinstatement upon the insurers where there are grounds of suspicion that the owner or occupier or other person who has insured the property is guilty of fraud or of wilfully setting fire to the property insured; but in this case the insurers would be more likely to repudiate liability.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/C. REINSTATEMENT UNDER STATUTE/638. Conditions of statutory obligation.

638. Conditions of statutory obligation.

No obligation to reinstate pursuant to the Fires Prevention (Metropolis) Act 1774¹ rests upon the insurers unless the insured is in a position to maintain a claim under the policy²; and they cannot be compelled to expend more than the sum insured³. The persons interested cannot do the work themselves and then call upon the insurers to pay over the insurance money to them⁴. The work must be done by the insurers⁵ unless, within 60 days after the adjustment of the claim, the insured gives sufficient⁶ security that he will expend the insurance money in reinstatement or the insurance money has been settled and disposed of among the contending parties⁷ to the satisfaction and approbation of the insurers⁸.

1 As to the obligation under the Fires Prevention (Metropolis) Act 1774 see PARA 637 ante.

2 *Matthey v Curling* [1922] 2 AC 180 at 219, CA, per Younger LJ; affd [1922] 2 AC 180 at 223, HL. Hence, no claim for reinstatement can be made by a person interested if the insured is shown to have been guilty of fraud or arson: *Logan v Hall* (1847) 4 CB 598 at 623 per Maule J. See also PARA 637 note 3 ante.

3 Fires Prevention (Metropolis) Act 1774 s 83.

4 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618 at 628 per Wood V-C.

5 Whether they can be compelled by a mandatory order (formerly mandamus: see CPR 54.1) to reinstate is doubtful. In *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618, the court held that mandamus would lie; but in *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* (1902) 18 TLR 815, a contrary view was taken. In *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA, the court, whilst doubting the accuracy of the report of *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* supra, declined to decide the point.

6 The persons interested are entitled to object to the sufficiency of the security: *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* (1902) 18 TLR 815.

7 This includes persons who have no interest in the insurance money, but who nevertheless, as being interested in the property, are insisting on reinstatement: *Sinnott v Bowden* [1912] 2 Ch 414 at 420 per Parker J.

8 Fires Prevention (Metropolis) Act 1774 s 83.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vi) Reinstatement/C. REINSTATEMENT UNDER STATUTE/639. Persons entitled to reinstatement.

639. Persons entitled to reinstatement.

The persons entitled to claim reinstatement under the Fires Prevention (Metropolis) Act 1774¹ include owners², mortgagors and mortgagees³, tenants for life and remaindermen⁴, lessors⁵, lessees⁶ and tenants for years⁷. There must be a distinct request for reinstatement under the statute. If not, the insurers may properly pay over the insurance money to the insured⁸, but once the request has been made they are no longer justified in paying the insured, and can, if necessary, be restrained from doing so⁹.

1 See PARAS 637-638 ante.

2 'Owner' probably includes a purchaser pending completion: *Rayner v Preston* (1881) 18 ChD 1 at 15, CA, per James LJ. Cf *Kern Corpn Ltd v Walter Reid Trading Pty Ltd* (1987) 71 ALR 417, Aust HC (purchaser of building requested insurers to reinstate after it was damaged by fire prior to completion of sale; insurers were not liable because original owner of building had not suffered any loss, purchaser having subsequently paid full purchase price on completion of sale after the fire).

3 *Sinnott v Bowden* [1912] 2 Ch 414, not following *Westminster Fire Office v Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 714, HL, per Lord Selborne; see also *Re Barker, ex p Gorely* (1864) 4 De GJ & Sm 477.

4 *Re Quicke's Trust, Poltimore v Quicke* [1908] 1 Ch 887.

5 *Vernon v Smith* (1821) 5 B & Ald 1; *Penniall v Harborne* (1848) 11 QB 368.

6 *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* (1902) 18 TLR 815; *Mumford Hotels Ltd v Wheler* [1964] Ch 117, [1963] 3 All ER 250.

7 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618.

8 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618 at 627 per Wood V-C; *Mumford Hotels Ltd v Wheler* [1964] Ch 117, [1963] 3 All ER 250.

9 *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* (1902) 18 TLR 815.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vii) Salvage/640. Powers of insurers as to salvage.

(vii) Salvage

640. Powers of insurers as to salvage.

The amount for which the insurers are liable depends upon the extent to which the insured property is destroyed or damaged, so they are directly interested in the steps taken to minimise the loss¹. Although it is the duty of the insured to minimise the loss², it is not a sufficient protection to the insurers to rely upon it, and therefore they are entitled to enter and remain on the premises where the fire is and to take possession of any salvage there³. The powers are in practice amplified and extended by the express terms of the policy.

1 *Ahmedbhoy Habbibhoy v Bombay Fire and Marine Insurance Co* (1912) 107 LT 668 at 670, PC.

2 *City Tailors Ltd v Evans* (1921) 126 LT 439 at 443, CA, per Scrutton LJ.

3 *Oldfield v Price* (1860) 2 F & F 80.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vii) Salvage/641. Exercise of insurers' powers.

641. Exercise of insurers' powers.

The powers of the insurers must be exercised reasonably and in accordance with the terms in which they are conferred¹. The insurers must not remain upon the premises for an unreasonable time or they will be liable in damages². If they take possession of the salvage it is their duty to take proper steps to preserve it from further damage and an action lies against them if the salvage continues to deteriorate³.

There are no rules as to notice of abandonment in fire insurance, but on payment of the loss in full the salvage is transferred to the insurers⁴.

1 Where the power to take possession and keep the salvage is exercisable so long as the claim is not adjusted the exercise of the power assumes a valid claim, and by retaining possession after the claim is made the insurers are estopped from objecting that the claim is out of time and therefore invalid: *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541, PC.

2 *Oldfield v Price* (1860) 2 F & F 80; *Norton v Royal Fire and Life Assurance Co* (1885) 1 TLR 460 at 461 (on appeal (1885) Times, 12 August, CA). Nor, it seems, may the insurers remain on the premises to the exclusion of the insured: *Oldfield v Price* supra.

3 *Ahmedbhoy Habbibhoy v Bombay Fire and Marine Insurance Co* (1912) 107 LT 668, PC.

4 *Rankin v Potter* (1873) LR 6 HL 83 at 118 per Blackburn J; see also *London Assurance Co v Sainsbury* (1783) 3 Doug KB 245 at 253; *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 61, CA; *Holmes v Payne* [1930] 2 KB 301. As to notice of abandonment in marine insurance see PARA 478 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vii) Salvage/642. Establishment of the London Salvage Corps.

642. Establishment of the London Salvage Corps.

The London Salvage Corps was established pursuant to statutory authority by insurance companies insuring property within Greater London¹, and is charged with the duty of attending fires and saving insured property². It is the duty of the London Fire Brigade³, with the sanction of the London Fire and Emergency Planning Authority⁴ and subject to any regulations that may be made by that authority, to afford the necessary assistance to the London Salvage Corps in the performance of its duties and, upon the application of any officer of the London Salvage Corps, to hand over to its custody property saved from fire⁵.

1 'Greater London' means the area comprising the areas of the London boroughs, the City and the Temples: London Government Act 1963 s 2(1). References to Greater London were substituted for references to the Metropolis by virtue of s 48(3) (as amended); see generally LONDON GOVERNMENT.

2 See the Metropolitan Fire Brigade Act 1865 s 29.

3 The force of firemen established under the Metropolitan Fire Brigade Act 1865 was named the London Fire Brigade by the London County Council (General Powers) Act 1904 s 46 (repealed). As to fire brigades generally see FIRE SERVICES.

4 As to the London Fire and Emergency Planning Authority see the Greater London Authority Act 1999 s 328(7), by virtue of which references to the authority were substituted for references to the Metropolitan Board of Works, the Greater London Council or the London Fire and Civil Defence Authority.

5 Metropolitan Fire Brigade Act 1865 s 29. No charge may be made by the authority for the services thus rendered by the London Fire Brigade: s 29.

UPDATE

642 Establishment of the London Salvage Corps

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(1) FIRE INSURANCE/(vii) Salvage/643. Contribution by insurers to London Fire Brigade.

643. Contribution by insurers to London Fire Brigade.

Every insurance company which insures against fire any property in Greater London¹ is under statutory obligation to pay to the London Fire and Emergency Planning Authority² a contribution towards the expenses of running the London Fire Brigade³. The payments must be made quarterly in advance on 1 January, 1 April, 1 July and 1 October in each year, at the rate of £35 for each £1m on the gross amounts insured by it (except by way of reinsurance) in respect of property in Greater London for a year⁴. These contributions are specialty debts recoverable as such⁵. In order to enable the contributions to be calculated, each such insurance company must make to the authority an annual return of the gross amounts of its fire insurances in Greater London, vouched by a declaration made by the secretary or other officer performing the duties of secretary of the company⁶. For default in making a return there is a penalty not exceeding £5 for every day during which the company is in default⁷. In addition, power is given to any officer appointed by the authority to inspect the company's books and papers and to make extracts from them, and the secretary or officer having custody of the books and papers who does not allow this to be done is liable on summary conviction to a penalty not exceeding level 1 on the standard scale for each offence⁸.

The London Fire Brigade is under a duty to send to the contributing insurance companies, in the morning of every day except Sundays, information of all fires in Greater London⁹.

1 As to the meaning of 'Greater London' see PARA 642 note 1 ante.

2 As to the London Fire and Emergency Planning Authority see PARA 642 note 4 ante.

3 Metropolitan Fire Brigade Act 1865 s 13 (ss 13, 15 amended by the Statute Law Revision Act 1875). As to the London Fire Brigade see PARA 642 note 3 ante.

4 Metropolitan Fire Brigade Act 1865 s 13 (as amended: see note 3 supra). The same rate applies to any fraction of £1m and to any fractional part of a year: s 13 (as so amended).

5 Ibid s 14.

6 Ibid s 15 (as amended: see note 3 supra). The secretary or other officer must declare that he has examined the return with the books of the company, and that to the best of his knowledge, information and belief it contains a true and faithful account of the gross amount of the sums insured by the company to which he belongs in respect of property in Greater London: s 15 (as so amended). The return must be made on 1 June or on such other days as the authority may appoint, and the return made in June of one year comes into effect on 1 January of the succeeding year and is the basis of contributions for that year: s 15 (as so amended).

7 Ibid s 16. Penalties are recoverable summarily: s 24.

8 Ibid s 17 (amended by virtue of the Criminal Law Act 1977 s 31; and by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 22 note 9 ante.

9 Metropolitan Fire Brigade Act 1865 s 31; see also FIRE SERVICES vol 18(2) (Reissue) PARA 9.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(i) Burglary Insurance: Perils Insured Against/644. Extent of protection.

(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD

(i) Burglary Insurance: Perils Insured Against

644. Extent of protection.

Movable property of all kinds is liable to attract those minded to break in and steal, and this is a risk which is capable of being covered by burglary insurance¹. In ordinary practice the protection given by a burglary insurance policy need not refer to loss by burglary in the strict sense², but may refer to loss by analogous crimes such as theft³ and robbery.

1 Burglary insurance falls within 'damage to property' insurance, and constitutes a 'contract of general insurance' within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt I; see PARA 21 ante.

2 For the meaning of 'burglary' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 294. As to the application of the technical meanings of criminal law terms to a policy of insurance see PARA 645 post.

3 For the meaning of 'theft' generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282. As to the meaning of 'theft' in marine insurance see PARA 340 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(i) Burglary Insurance: Perils Insured Against/645. Use of criminal law terms.

645. Use of criminal law terms.

Where the perils insured against are described in technical terms of the criminal law there is a presumption that they are intended to bear their technical meaning¹. The presumption may be rebutted by the language of the policy; thus a policy insuring against loss by burglary and containing a definition of the word 'burglary' bears on the face of it an indication that the word is not intended to bear its ordinary technical meaning as used in the criminal law². The act that causes the loss must fall within the definition in the policy, which may be wider or narrower than the technical meaning; accordingly it may be necessary, or alternatively it may not be sufficient, to show that a burglary has been committed according to the criminal law³.

1 *Re Calf and Sun Insurance Office* [1920] 2 KB 366 at 380, CA, per Atkin LJ; cf *Lake v Simmons* [1927] AC 487 at 509, HL, per Lord Sumner; and see further PARA 85 ante.

2 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 601, CA, per Lord Russell of Killowen CJ.

3 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(i) Burglary Insurance: Perils Insured Against/646. Forcible and violent entry.

646. Forcible and violent entry.

The terms of a burglary insurance may exclude liability in certain circumstances unless there is forcible and violent entry into the premises¹. If so, the entry must be obtained by the use of both force and violence or the definition is not satisfied and the policy does not apply². An entry obtained by turning the handle of an outside door or by using a skeleton key, though sufficient to constitute a criminal offence³, is not within the policy since the element of violence is absent⁴. However, an entry obtained by picking the lock or forcing back the catch by means of an instrument involves the use of violence and is therefore covered⁵. The policy may be so framed as to apply only to violent entry from the outside⁶; or the violent entry into a room within the insured premises may be sufficient⁷. In any case, the violence must be connected with the act of entry; if the entry is obtained without violence, the subsequent use of violence to effect the theft, as for instance where a show-case is broken open, does not bring the loss within the policy⁸.

1 Alternatively, the policy may refer to breaking into or out of the premises. See PARA 644 ante.

2 *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA, explaining *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA.

3 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 294.

4 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA; cf *Saqui and Lawrence v Stearns* [1911] 1 KB 426, CA; *Dino Services Ltd v Prudential Assurance Co Ltd* [1989] 1 All ER 422, [1989] 1 Lloyd's Rep 379, CA.

5 *Re Calf and Sun Insurance Office* [1920] 2 KB 366 at 382, CA, per Atkin LJ.

6 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA.

7 *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA.

8 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595, CA.

UPDATE

646 Forcible and violent entry

NOTE 7--See also *Edinburgh University v Eagle Star Insurance Co Ltd* (2003) Times, 6 October, OH.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(i) Burglary Insurance: Perils Insured Against/647. Exceptions in a burglary policy.

647. Exceptions in a burglary policy.

The exceptions in a burglary policy are more or less standardised. There may be an exception excluding losses due to hostilities¹ and similar perils², and there is commonly an exception excluding losses which are capable of being covered, and which are in practice covered, by some other kind of insurance, such as fire or plate-glass policies in the usual form³. Therefore, if a thief breaks a plate-glass window, which is separately insured, for the purpose of obtaining entry to the premises, the breakage falls within the scope of the plate-glass policy⁴. There is usually an important exception excluding liability where the crime causing the loss is committed by, or with the connivance or assistance of, a person belonging to a specified class, such as inmates of the insured premises, members of the insured's household or business staff, tenants, lodgers and persons lawfully on the insured premises⁵. To bring such an exception into operation, it is unnecessary to prove that an excepted person was the person who actually committed the crime⁶, but the onus of establishing the exception is on the insurers⁷.

1 Such an exception did not apply to an isolated burglary taking place during an air raid: *Winicofsky v Army and Navy General Assurance Association* (1919) 35 TLR 283.

2 See *Motor Union Insurance Co v Boggan* (1923) 130 LT 588, HL; *London and Lancashire Fire Insurance Co Ltd v Bolands Ltd* [1924] AC 836, HL; see also PARAS 596-599 ante.

3 In the case of fire insurance, a loss by theft in the course of fire may be a loss proximately caused by fire: see PARA 603 ante.

4 Cf *Marsden v City and County Assurance Co* (1865) LR 1 CP 232 (plate-glass window insured against damage except by fire or breakage during removal; damaged by mob attracted by fire in remote part of premises, and broken for purposes of plunder; mob's act was proximate cause of damage).

5 *Saqui and Lawrence v Stearns* [1911] 1 KB 426, CA; *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA; *Lake v Simmons* [1927] AC 487, HL; *Greaves v Drysdale* [1936] 2 All ER 470, CA.

6 *Saqui and Lawrence v Stearns* [1911] 1 KB 426, CA; cf *Hurst v Evans* [1917] 1 KB 352, disapproved as to onus of proof in *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78.

7 *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78; *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476. For the general principle that the onus is on the insurers to show that any exception clause of the policy applies so as to relieve them from liability see PARA 111 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(ii) Special Features of Burglary Insurance/648. The moral hazard.

(ii) Special Features of Burglary Insurance

648. The moral hazard.

The general principles relating to fire insurance¹ apply to burglary insurance² so far as they are appropriate. In burglary insurance the moral hazard is particularly important³. Consequently the nationality of origin of the insured⁴, as well as his previous experience of losses⁵, his previous convictions⁶ and the fact that another insurer has refused to issue⁷ or renew⁸ a policy, have been held to be material facts which ought to be disclosed.

1 See PARA 591 et seq ante.

2 As to what is included in 'burglary insurance' see PARAS 644-645 ante.

3 As to the moral hazard see PARA 40 ante.

4 See *Horne v Poland* [1922] 2 KB 364. Discrimination in the provision of insurance services on the ground of nationality is now unlawful: see PARA 71 ante; and DISCRIMINATION vol 13 (2007 Reissue) PARA 461.

5 See *Krantz v Allan and Faber* (1921) 9 LI L Rep 410; *Becker v Marshall* (1922) 12 LI L Rep 413, CA; *Rozanes v Bowen* (1928) 32 LI L Rep 98, CA.

6 See *Schoolman v Hall* [1951] 1 Lloyd's Rep 139, CA; *Regina Fur Co Ltd v Bossom* [1957] 2 Lloyd's Rep 466 (affd on another point [1958] 2 Lloyd's Rep 425, CA); *Roselodge Ltd (formerly Rose Diamond Products Ltd) v Castle* [1966] 2 Lloyd's Rep 105, CA.

7 See *Glicksman v Lancashire and General Assurance Co Ltd* [1927] AC 139, HL.

8 See *Ascott v Cornhill Insurance Co Ltd* (1937) 58 LI L Rep 41.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(ii) Special Features of Burglary Insurance/649. Precautions to be taken.

649. Precautions to be taken.

A burglary insurance policy¹ may contain a condition imposing on the insured the duty of taking proper precautions for the safety of the insured property, such as securing all doors, windows, and other means of entrance. A failure to lock the door of an inside showcase is not a breach of such a condition². This duty may be amplified by a condition which provides that the premises are always to be occupied³ or that they are not to be left unoccupied at night⁴. Such a condition does not require the continuous presence of someone on the premises; premises do not become unoccupied for the purposes of the condition by reason of the temporary absence of all the inmates⁵. A condition may also require proper books of account to be kept⁶ or a burglar alarm to be fitted⁷.

1 See PARA 644 ante.

2 *Re George and Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 at 609, CA, per A L Smith LJ. However, a specific condition to that effect could be included in the policy, breach of which would relieve the insurer of liability.

3 *Simmonds v Cockell* [1920] 1 KB 843.

4 *Winicofsky v Army and Navy General Assurance Association* (1919) 88 LJB 1111.

5 *Winicofsky v Army and Navy General Assurance Association* (1919) 88 LJB 1111; *Simmonds v Cockell* [1920] 1 KB 843. See note 2 supra.

6 *Jacobson v Yorkshire Insurance Co Ltd* (1933) 45 Ll L Rep 281; *Shoot v Hill* (1936) 55 Ll L Rep 29; *Bennett v Yorkshire Insurance Co Ltd* [1962] 2 Lloyd's Rep 270.

7 *Shoot v Hill* (1936) 55 Ll L Rep 29; *Roberts v Eagle Star Insurance Co Ltd* [1960] 1 Lloyd's Rep 615; *Allan Peters (Jewellers) Ltd v Brocks Alarms Ltd* [1968] 1 Lloyd's Rep 387; *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd* [1980] 1 Lloyd's Rep 523.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(ii) Special Features of Burglary Insurance/650. Limitation of risk by reference to locality.

650. Limitation of risk by reference to locality.

Burglary¹ is a crime associated with buildings, and burglary insurance contemplates that the property which is stolen shall have been stolen from the premises described in the policy². If the premises described comprise part of a building only, the property must be stolen from that part; a theft from any other part is not covered³. Similarly, if theft is covered while a van is in a garage, the policy does not apply if the van is left in an unlocked yard⁴.

1 For the meaning of 'burglary' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 294; and as to what is included in 'burglary insurance' see PARAS 644-645 ante.

2 As to the locality as part of the description see generally para 118 ante.

3 *Re Calf and Sun Insurance Office* [1920] 2 KB 366, CA.

4 *Barnett and Block v National Parcels Insurance Co Ltd* [1942] 1 All ER 221 (affd [1942] 2 All ER 55n, CA); *Leo Rapp Ltd v McClure* [1955] 1 Lloyd's Rep 292 (goods insured 'whilst in warehouse'; theft of goods from lorry parked in locked compound enclosed by brick wall held not to be covered).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(iii) Bankers' and Stockbrokers' Policies/651. Necessity for special protection.

(iii) Bankers' and Stockbrokers' Policies

651. Necessity for special protection.

Certain forms of property, such as money and securities for money, are often expressly excepted from the protection of an ordinary burglary policy. However, bankers and stockbrokers who habitually deal with such forms of property require protection against their peculiar risks. To give them adequate protection the policy must not only cover the stealing of money and securities for money, it must extend beyond the risk of ordinary theft and cover losses occasioned by fraud. Consequently, there are special forms of insurance for protecting bankers and stockbrokers against the loss of money and securities¹.

¹ *Equitable Trust Co of New York v Whittaker* (1923) 17 Ll L Rep 153; *Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717, [1995] 1 WLR 1580, HL; and see *Philadelphia National Bank v Price* [1938] 2 All ER 199, CA, for a policy covering advances made by a bank on invalid documents. Cf *Equitable Trust Co of New York v Henderson* (1930) 47 TLR 90; *Lazard Bros & Co Ltd v Brooks* (1932) 38 Com Cas 46, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(iii) Bankers' and Stockbrokers' Policies/652. Obtaining property by deception.

652. Obtaining property by deception.

In the case of obtaining property by deception¹, the extent of the protection in bankers' and stockbrokers' policies depends on the words used in the policy². If the policy covers obtaining by fraudulent means there must be an actual fraudulent obtaining; thus a loss which results not from a fraudulent obtaining but from a fraudulent contract is not within the policy³. There is a fraudulent obtaining, for example, where securities are obtained from a stockbroker by a customer in exchange for a cheque which, to the customer's knowledge, will be dishonoured on presentation⁴. On the other hand, where a bank discounts for a customer bills which, to the customer's knowledge, are forgeries and places the amount of them, less discount, to the credit of his account, the subsequent withdrawal of the money from his account by means of cheques drawn by the customers upon the bank is not an obtaining by fraudulent means; the loss results from the contract between the bank and its customer⁵. However, the policy may be so worded as to cover this kind of loss⁶.

¹ As to obtaining property by deception see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 310.

² See *Pennsylvania Co for Insurances on Lives and Granting Annuities v Mumford* [1920] 2 KB 537, CA, where a policy covering securities 'supposed or believed to be' upon the premises of the bank at a particular date did not cover securities which were falsely represented to have been handed back to customers before that date, since the bank supposed or believed that they had been returned; *Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717, [1995] 1 WLR 1580, HL, where a policy covering losses incurred by reason of 'theft, larceny or false pretences, committed by persons present on the premises of the Assured' only covered theft committed by a person or persons physically on the bank's premises; *Proudfoot plc v Federal Insurance Co* [1997] LRLR 659, where an independent contractor was held not to be an 'employee' or 'trustee' within the meaning of the policy.

³ *Century Bank of the City of New York v Mountain* (1914) 112 LT 484, CA.

⁴ *Pawle & Co v Bussell* (1916) 85 LJBK 1191; *Lim Trading Co v Haydon* [1968] 1 Lloyd's Rep 159, Sing HC.

⁵ *Century Bank of the City of New York v Mountain* (1914) 112 LT 484, CA.

⁶ *Wasserman v Blackburn* (1926) 43 TLR 95; *Lazard Bros & Co v Brooks* (1932) 38 Com Cas 46, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(2) INSURANCE AGAINST BURGLARY, THEFT AND FRAUD/(iii) Bankers' and Stockbrokers' Policies/653. Property in transit.

653. Property in transit.

Ordinary burglary insurance covers property stolen from particular premises only¹. However, under bankers' and stockbrokers' policies, property may be covered in transit, in which case the loss must be sustained in the course of the transit described in the policy². Transit 'between any houses or places' does not cover transit from one room to another in the same building³.

1 As to the premises described see PARA 650 ante.

2 *Richardson v Roylance* (1933) 50 TLR 99.

3 *Pennsylvania Co for Insurances on Lives and Granting Annuities v Mumford* [1920] 2 KB 537, CA. As to insurance by carriers see PARA 705 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(i) Special Perils/654. Perils normally excepted.

(3) MISCELLANEOUS PROPERTY INSURANCES

(i) Special Perils

654. Perils normally excepted.

Any contingency which is likely to result in loss to the insured if it affects his property may be insured against if insurers can be found who are willing to bear the risk and the proposer is willing to pay what may be a heavy rate of premium¹. In particular, insurances may be effected to cover perils which are usually excepted under a policy in the ordinary form². An insurance may be effected to cover loss caused by war³, military or usurped power⁴, riot, civil commotion⁵ or strikes⁶; or by the subsidence or collapse of a building⁷, or by water damage⁸, or by the explosion of boilers⁹. Again, flood¹⁰, storm and tempest¹¹ and, in some parts of the world, earthquakes, are commonly covered. Except where special provision is made, the policy covers the actual loss of the property only¹² and not a consequential loss¹³ arising from the insured's inability to deal with his property because of the intervention of the peril¹⁴.

1 As to assessment of the premium see PARA 129 ante.

2 As to exceptions in fire policies see PARAS 595-602 ante.

3 War includes civil war: *Pesquerias y Secaderos de Bacalao de España SA v Beer* [1949] 1 All ER 845n, HL. See further PARA 598 ante.

4 *Curtis & Sons v Mathews* [1919] 1 KB 425, CA. See further PARA 599 ante.

5 *London and Manchester Plate Glass Co Ltd v Heath* [1913] 3 KB 411, CA; see also *Curtis & Co v Head* (1902) 18 TLR 771, CA. See further PARAS 596-597 ante.

6 *Lewis Emanuel & Son Ltd v Hepburn* [1960] 1 Lloyd's Rep 304.

7 *David Allen & Sons Billposting Ltd v Drysdale* [1939] 4 All ER 113 (intentional demolition is not a collapse).

8 *Kündig v Hepburn* [1959] 1 Lloyd's Rep 183.

9 *Re Willesden Borough Council and Municipal Mutual Insurance Ltd* [1944] 2 All ER 600; affd [1945] 1 All ER 444n, CA (insurance covering damage by explosion of boilers used for domestic purposes only; whether boilers used for domestic purposes depends, not on the use of the premises where the boiler is, but on the use of the boiler).

10 *Young v Sun Alliance and London Insurance Ltd* [1976] 3 All ER 561, [1976] 1 WLR 104, CA (a 'flood' is something large, sudden and temporary, not naturally there, such as a river overflowing its banks; three inches of water caused by natural seepage not a flood); *Rohan Investments Ltd v Cunningham and Members of Syndicate 877 at Lloyd's (t/a Criterion Insurance Services)* [1999] Lloyd's Rep IR 190, CA (an ingress of water to a property from an accumulation of rain on a flat roof held to be flood).

11 As to the meaning of 'storm and tempest' see *Oddy v Phoenix Assurance Co Ltd* [1966] 1 Lloyd's Rep 134. 'Storm' is something more prolonged and widespread than a gust of wind: *S and M Hotels Ltd v Legal and General Assurance Society Ltd* [1972] 1 Lloyd's Rep 157. A 'storm' includes a heavy snowfall: *Glasgow Training Group (Motor Trade) Ltd v Lombard Continental plc* 1989 SLT 375, Ct of Sess. The question whether 'storm' meant a heavy fall of rain unaccompanied by wind was left open in *Anderson v Norwich Union Fire Insurance Society Ltd* [1977] 1 Lloyd's Rep 253.

12 *Molinos De Arroz v Mumford* (1900) 16 TLR 469.

13 As to consequential loss generally see PARAS 800-804 post.

14 *Molinos De Arroz v Mumford* (1900) 16 TLR 469; *Mitsui v Mumford* [1915] 2 KB 27; *Campbell and Phillips Ltd v Denman* (1915) 21 Com Cas 357. Cf 'all risks insurance' in PARAS 658-659 post.

UPDATE

654 Perils normally excepted

NOTE 10--See also *Board of Trustees of the Tate Gallery v Duffy Construction Ltd* [2007] EWHC 361 (TCC), [2007] 1 All ER (Comm) 1004.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(i) Special Perils/655. Property subject to special perils.

655. Property subject to special perils.

Particular forms of property may be insured against their own special perils. Thus special forms of policy have been devised to cover plate glass in the event of breakage, whether in transit or in situ¹, or for the holder of a licence for the sale of intoxicating liquor to insure against the loss occasioned by the forfeiture of the licence or by the refusal of the licensing justices to renew it².

The insurance of motor vehicles is dealt with elsewhere in this title³.

1 *Marsden v City and County Assurance Co* (1865) LR 1 CP 232; *London and Manchester Plate Glass Ltd v Heath* [1913] 3 KB 41, CA.

2 As to the construction of covenants by lessees of public houses to insure see *Williams v Lassell and Sharman Ltd* (1906) 22 TLR 443; *Wootton v Lichfield Brewery Co* [1916] 1 Ch 44, CA.

3 See PARA 706 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(ii) Livestock Insurance/656. Scope of the insurance.

(ii) Livestock Insurance

656. Scope of the insurance.

Horses, cattle, sheep and pigs¹ may be insured by a policy of livestock insurance, which is usually on the life of the animal insured². The policy may cover death by accident³ as well as by illness or disease; death in the ordinary course of nature from old age may be excluded. Except in special cases, mere injury which does not lead to death is not covered⁴. The death is usually required to be certified by a veterinary surgeon, but this requirement can, of course, be waived⁵.

Livestock policies usually contain a special condition of average, requiring the insured to bear a portion, usually a quarter, of the loss himself⁶.

Livestock may also be insured against theft or unlawful removal.

1 Horses may also be insured under a combined policy as part of the insured's business plant: see *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224.

2 *A-G v Cleobury* (1849) 4 Exch 65.

3 *Burridge & Son v F H Haines & Sons Ltd* (1918) 87 LJKB 641.

4 See *Jacob v Gaviller* (1902) 87 LT 26.

5 *Burridge & Son v F H Haines & Sons Ltd* (1918) 118 LT 681; *Shiells v Scottish Assurance Corpn* (1889) 16 R 1014 at 1020-1022, Ct of Sess.

6 As to average see generally para 213 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(ii) Livestock Insurance/657. Position where animal is slaughtered.

657. Position where animal is slaughtered.

Where an animal is slaughtered the liability of the insurers depends on the terms of the policy and the circumstances in which the animal is slaughtered. The slaughter of an animal for food in the ordinary course of making use of it will clearly fall outside the policy; but where it is slaughtered for humane reasons after suffering injury in an accident, the policy applies, since the injuries are in effect fatal¹. The policy may exclude liability even where the animal is compulsorily slaughtered under statutory powers².

1 *Shiells v Scottish Assurance Corpn* (1889) 16 R 1014 at 1019, Ct of Sess. The animal must, of course, be reasonably slaughtered for the purpose of saving it unnecessary suffering. The onus of proving that slaughter was necessary is on the insured: *Shiells v Scottish Assurance Corpn* supra.

Policies usually provide that the insurers will not invoke an exclusion against slaughter where they have agreed to the slaughter or where, in prescribed circumstances, a veterinary surgeon certifies that the suffering is incurable and that immediate destruction is imperative for humane reasons.

2 As to the compulsory slaughter of animals and compensation therefor see ANIMALS vol 2 (2008) PARA 1089 et seq.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(iii) All Risks Insurance/658. Loss however caused.

(iii) All Risks Insurance

658. Loss however caused.

Property may be insured against all risks¹. In this case the nature of the casualty causing the loss is immaterial; the policy covers the loss however caused. The extent of the cover must be construed in the context of the policy as a whole², and may also be limited by exception³. The onus of proving the loss lies upon the insured⁴.

1 'These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies': *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41 at 46, 90 LJB 801 at 803, HL, per Lord Birkenhead LC; see PARA 659 post. See also *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, [1983] 3 All ER 35.

2 *Coven Spa v Hong Kong Chinese Insurance Co Ltd* [1999] Lloyd's Rep IR 565, CA.

3 See eg *Lake v Simmons* [1927] AC 487, HL (exception against theft or dishonesty by an employee, customer, broker or broker's customer in respect of policy on jewellery).

4 *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559, CA; *Hurst v Evans* [1917] 1 KB 352, where it was further held that the insured had to prove that the loss did not fall within an exception; but see contra *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78; *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/7. PROPERTY INSURANCE/(3) MISCELLANEOUS PROPERTY INSURANCES/(iii) All Risks Insurance/659. What constitutes a loss.

659. What constitutes a loss.

To constitute a loss under an all risks policy there must be something accidental and fortuitous which can be described as a casualty¹, but the property need not have been actually destroyed; there may be a loss though the property still exists if the insured has been deprived of it as the result of some casualty². The question whether the deprivation amounts to a loss depends upon the character and extent of the deprivation. The deprivation must be more than merely temporary, but it need not be complete, amounting to a certainty that the property can never be recovered³. The test is uncertainty of recovery⁴, and the steps to be taken to effect recovery must be such as are reasonable in all the circumstances⁵. There is a loss within the policy if it appears that the insured has at most a mere chance of recovering his property, and will in all probability never recover it⁶. However, if on the balance of probabilities there is no reason to believe that the property will not ultimately be recovered, though the time of recovery may be uncertain, then the deprivation does not constitute a loss⁷. If a pearl necklace disappears and, notwithstanding that diligent search has been made, is not found within a reasonable time, the conclusion may be that there is no reasonable prospect that it will be recovered and it is regarded as lost⁸. If pearls are consigned to a customer abroad on sale or return, the outbreak of war may render the return of them impossible until the conclusion of peace; but, in the absence of any evidence to the contrary, it cannot be assumed that they will not be returned when circumstances permit and, consequently, there is no loss⁹. Again, if a person intending to dispose of an article hands it over in return for a cheque for the agreed purchase price and the cheque turns out to be worthless, he loses his money, not the article¹⁰; however, if the article is entrusted to an agent for sale, and the agent converts it to his own use and fails to account for the proceeds, the article can properly be said to have been lost¹¹.

1 *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41, 90 LJKB 801, HL; *London and Provincial Leather Processes Ltd v Hudson* [1939] 2 KB 724, [1939] 3 All ER 857.

2 *Holmes v Payne* [1930] 2 KB 301, where a pearl necklace, insured against loss at agreed value, disappeared; there was agreement between the insurers and the insured that the insurers should provide articles of equal value; articles up to part of such value were provided, but the necklace subsequently fell out of the insured's cloak; it was held that the replacement agreement did not contain an implied term that if the necklace was found the agreement would be void; the insured was entitled to retain articles which she had received and to receive other articles up to the agreed value, the insurers taking the necklace as salvage; it seems that the necklace had been 'lost' within the meaning of the policy.

3 *Moore v Evans* as reported in [1917] 1 KB 458 at 471, CA, per Bankes LJ; affd [1918] AC 185, HL.

4 *Holmes v Payne* [1930] 2 KB 301 at 310 per Roche J.

5 *Webster v General Accident, Fire and Life Assurance Corp'n Ltd* [1953] 1 QB 520, [1953] 1 All ER 663.

6 *Moore v Evans* [1917] 1 KB 458, CA (affd [1918] AC 185, HL); *Webster v General Accident, Fire and Life Assurance Corp'n Ltd* [1953] 1 QB 520, [1953] 1 All ER 663.

7 *Moore v Evans* [1917] 1 KB 458 at 473, CA, per Bankes LJ (affd [1918] AC 185, HL).

8 *Holmes v Payne* [1930] 2 KB 301 at 310. See note 2 supra.

9 *Moore v Evans* [1917] 1 KB 458 at 473, CA, per Bankes LJ (affd [1918] AC 185, HL); cf *White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co* (1922) 127 LT 571, CA.

10 *Eisinger v General Accident Fire and Life Assurance Corp'n Ltd* [1955] 2 All ER 897, [1955] 1 WLR 869 (motor policy).

11 *Webster v General Accident Fire and Life Assurance Corp'n Ltd* [1953] 1 QB 520, [1953] 1 All ER 663; cf *London and Provincial Leather Processes Ltd v Hudson* [1939] 2 KB 724, [1939] 3 All ER 857.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(i) Nature of the Insurance/660. Nature of liability insurance.

8. LIABILITY INSURANCE

(1) IN GENERAL

(i) Nature of the Insurance

660. Nature of liability insurance.

In liability insurance¹ the event insured against affects the insured financially by reason of his becoming liable to pay to a third party either damages for breach of contract or tort, or some other form of compensation, restitution or reimbursement. Frequently this liability to third parties arises in connection with property, and the event which gives rise to the liability may at the same time cause loss of the property. Insurance against liability is, therefore, frequently combined with insurance against loss of the property, as in a householder's comprehensive policy, or a comprehensive policy of motor or aviation insurance². However, unless special provision is made, an insurance on property does not cover a liability incidentally arising from or connected with the property, thus, for example, if a ship is insured against loss or damage, this insurance does not cover the owners' liability to pay wages, or to provide subsistence to the crew, while the ship is being repaired³; nor is the usual form of fire policy on a house expressed to cover the householder's legal liability if the fire spreads to adjoining property⁴. It is, of course, different where a person by contract or otherwise is responsible for the safe custody of property; his potential liability to the true owner in such a case may well be the foundation, in whole or in part, of his having an insurable interest up to the full value of the property⁵.

1 For the meaning of liability insurance see PARA 21 ante.

2 Motor and aviation insurance are specialised branches of the law of insurance and are dealt with separately. As to aviation insurance see PARAS 523-524 ante; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 134. As to motor insurance see PARA 706 et seq post.

3 *De Vaux v Salvador* (1836) 4 Ad & El 420.

4 For a discussion of this form of legal liability see *Balfour v Barty-King* [1957] 1 QB 496, [1957] 1 All ER 156, CA.

5 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583-584, CA, per Mellish LJ; see PARA 699 post. As to a carrier's insurance of goods in transit see PARA 705 post. Apart from such cases of potential liability to the true owner of property, third party liability is normally a peril against which specific insurance is required.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(i) Nature of the Insurance/661. Indemnity as basis of contract.

661. Indemnity as basis of contract.

A contract of liability insurance is a contract of indemnity¹. This is normally indicated by the wording of the policy which is designed to make it clear that the insurers undertake to indemnify the insured against legal liabilities incurred by him within a specified range. If a policy contains a provision by virtue of which the insurers may be bound to pay a claim even though it is legally a bad claim, the policy is, it seems, a policy of contingency insurance, rather than liability insurance².

¹ *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014, CA, per Fletcher Moulton LJ.

² As to contingency or pecuniary loss insurance see PARA 780 et seq post. Where the loss is caused by the action of two concurrent and independent causes, one of which is the peril insured against and the other an excepted cause, and the loss is not within the policy because it may be accurately described as caused by the excepted cause, it is immaterial that it may be described in another way which would not bring it within the exception: *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corpn Ltd* [1974] QB 57, [1973] 3 All ER 825, CA.

UPDATE

661 Indemnity as basis of contract

NOTES--See *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2006] 1 WLR 1492 (worker inhaled asbestos dust and diagnosed as suffering from mesothelioma nearly 30 years later: as worker would have been unable to claim until later date, liability insurance policy effective at that date); *Durham v BAI (Run Off) Ltd (in scheme of arrangement)*; *Re Employers' Liability Policy 'Trigger' Litigation* [2008] EWHC 2692 (QB), [2009] 2 All ER 26 (injury sustained and disease contracted when injury or disease caused; policy to be so construed).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(i) Nature of the Insurance/662. Forms of liability insurance.

662. Forms of liability insurance.

Liability insurance may be in the form of a personal liability policy covering all types of liability apart from certain specified exceptions¹, or conversely it may be limited to liabilities of a particular kind. For example, policies of motor insurance and aircraft insurance are specially designed to cover liabilities arising out of the use of motor vehicles and aircraft respectively². Similarly, more or less standard forms of policy have been designed to cover the risk of an employer being held liable at common law, or under some statutory provision or regulation, to his employees³, of a professional person being held to have been negligent in carrying on practice as a solicitor, accountant, valuer, or the like⁴, of a carrier or other bailee being held liable to the owner of goods in his custody which are lost, damaged or destroyed⁵, or of a building, engineering or public works contractor being held liable to members of the public by reason of his operations⁶. Again, an owner and occupier of buildings, whether domestic or commercial, may incur liability to people using an adjoining highway, or liability to visitors, either generally in connection with the buildings⁷, or more particularly in connection with lifts or other machinery or plant installed there. Specialised insurances may be obtained by the proprietor of a newspaper against the risk of having to pay damages for libel⁸, or against other risks of liability by reason of the publication of his newspaper⁹. Even the playing of games or providing of amusements¹⁰ may involve a third party liability, and appropriate insurances have been designed for these risks. Licensees of nuclear sites must take out special cover by insurance or some other means in respect of liability to a third party¹¹. Many forms of liability policy, particularly those on professional risks, are written on a 'claims made' basis, so that the policy will respond if the third party makes a claim against the insured during the currency of the policy even though the events giving rise to the claim arose at some earlier date.

1 Normally these exclusions operate where special risks arise or where cover can be obtained under other policies. Examples are liabilities incurred to employees, or arising out of the carrying on of a trade, business or profession, or from the occupation of property or the use of a motor vehicle, aircraft or vessel.

2 As to motor insurance see PARA 706 et seq post. As to aviation insurance see PARAS 523-524 ante.

3 As to employer's liability insurances see PARAS 685-689 post.

4 As to professional negligence insurance see PARAS 692-697 post.

5 As to bailee's insurance see PARAS 698-705 post.

6 Such policies are generally called 'public liability policies'. As to the liability of a building or engineering contractor for injury to persons or property see generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARAS 166-169.

7 For householders, most insurers issue a 'householder's comprehensive policy' which covers the premises against fire and other damage, the contents against loss or damage over a wide range, and the occupiers against employer's liability to domestic servants and public liability to the world at large.

8 *E Hulton & Co Ltd v Mountain* (1921) 37 TLR 869, CA.

9 Cf the contract in *Daily Express (1908) Ltd v Mountain* (1916) 32 TLR 592, CA (a case relating to disclosure).

10 *Captain Boyton's World's Water Show Syndicate Ltd v Employers' Liability Assurance Corp'n Ltd* (1895) 11 TLR 384, CA. A marina operator may effect a liability policy in respect of operations carried out on the premises, eg alteration, repair, maintenance and storage: see *Pillgrem v Cliff Richardson Boats Ltd and Richardson (Switzerland General Insurance Co, third party)* [1977] 1 Lloyd's Rep 297, Ont SC.

11 See the Nuclear Installations Act 1965 s 19 (as amended); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1510.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(ii) Scope of the Insurance/663. Legal liability.

(ii) Scope of the Insurance

663. Legal liability.

The event upon which the obligation of the insurers to indemnify the insured depends is the happening of the liability insured against¹. The liability must normally be a legal liability², arising without fraud on the part of the insured³; in the absence of legal liability no claim arises under a policy in the usual form⁴.

1 See *Lancashire Insurance Co v IRC* [1899] 1 QB 353 at 359 per Bruce J.

2 *Haseldine v Hosken* [1933] 1 KB 822, CA; *Structural Polymer Technologies Ltd v Brown (on behalf of Syndicate 702 at Lloyd's)* [2000] Lloyd's Rep IR 64. A liability which becomes effective through waiver of diplomatic privilege is a legal liability: *Dickinson v Del Solar* [1930] 1 KB 376. Insurance against liability for compensation arising from the actions of employees may include exemplary damages: *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, [1996] 3 All ER 493.

3 *MDIS Ltd (formerly McDonnell Information Systems Ltd) v Swinbank* [1999] 2 All ER (Comm) 722, [1999] Lloyd's Rep IR 516, CA.

4 *Scott v McIntosh* (1814) 2 Dow 322, HL (illegal ballot). A person who threatens unlawful violence to another person by means of a loaded shotgun is prohibited by public policy from obtaining an indemnity under a public liability insurance policy should injury to or the death of that other person result: *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA. A policy may contain a provision by which a claim may be payable in certain circumstances even though there is no legal liability, but such a policy is, it seems, a policy of contingency insurance: see PARA 782 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(ii) Scope of the Insurance/664. Description of liability.

664. Description of liability.

The liability must be the liability described in the policy. If the liability is described as arising out of a particular kind of accident, it must be shown that that kind of accident has happened¹; if the liability is to arise out of accidents connected with a particular business, liability arising out of accidents not connected with that business is not covered². A policy covering personal injury to any person under a contract of service with a contractor does not cover injury to a workman temporarily lent to the contractor by persons who employ the contractor³, and a policy covering liability for a negligent act, omission or error does not cover liability for fraudulent acts⁴. Hence, the description defines the scope of the insurance, and, if expressed in terms of precision, may have the effect of considerably limiting it⁵. Thus, an insurance which is expressed to cover an employer's statutory liability to his workmen does not cover his common law liability⁶; and an insurance confined to liability for accidents happening in a particular locality has no application in the case of accidents happening elsewhere⁷. A product liability policy covering a supplier's liability for personal injury or damage to other products does not cover any liability faced by the insured for economic loss suffered by a customer who has himself lost business by reason of being supplied with defective products⁸.

The risk is further defined in effect by the questions in the proposal form⁹, which, when completed, is usually made the basis of the contract¹⁰. In particular, importance is attached to the occupation of the insured¹¹, including, in the case of a business, the nature of the business¹², the number of employees and the capacity in which they are employed¹³, and to the insured's previous experience of the proposed risk¹⁴.

1 *Captain Boyton's World's Water Show Syndicate Ltd v Employers' Liability Assurance Corp'n Ltd* (1895) 11 TLR 384, CA; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA; *Straits Towing Ltd v Walkem Machinery and Equipment Ltd* [1973] 5 WWR 212, BC CA (collapse of crane).

2 *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233; cf *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521 at 524 per Bray J.

3 *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA; see PARA 686 note 2 post.

4 See PARA 693 post.

5 For rules of construction see PARAS 83-89 ante.

6 *Morrison and Masson v Scottish Employers' Liability and Accident Assurance Co* (1888) 16 R 212, Ct of Sess.

7 *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233; see further PARA 715 post.

8 *AS Screenprint Ltd v British Reserve Insurance Co Ltd* [1999] Lloyd's Rep IR 430, CA; *Rexodan International Ltd v Commercial Union Assurance Co plc* [1999] Lloyd's Rep IR 495; *James Budgett Sugars Ltd v Norwich Union Insurance Ltd* [2002] EWHC 968 (Comm).

9 As to the proposal generally see PARAS 56-62 ante.

10 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; see further PARA 62 ante.

11 *Equitable Life Assurance Society v General Accident Assurance Corp'n* 1904 12 SLT 348.

12 *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521. See also PARA 120 ante.

13 *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233.

14 *Reid & Co v Employers' Accident etc Insurance Co* (1899) 1 F 1031, Ct of Sess; *Life and Health Assurance Association v Yule* (1904) 6 F 437, Ct of Sess; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at 364, CA; see also *Dunn v Ocean Accident and Guarantee Corpn* (1933) 50 TLR 32 at 33, CA; and PARA 59 ante.

UPDATE

664 Description of liability

NOTE 8--See also *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23, [2005] 1 All ER (Comm) 283 (policy insuring against physical damage to property belonging to others; insured supplying defective glass panels, which appeared liable to cause physical damage; policy not covering action taken to prevent possibility of future damage).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(ii) Scope of the Insurance/665. Use of exceptions.

665. Use of exceptions.

Where, by definition or description, the insurance afforded by a policy comes within a stipulated category, it is not usual to find in the policy the majority of the exceptions which are commonly found in other types of non-marine insurance¹. Thus, in practice, employers' liability policies contain no exceptions, their ambit being defined by the description of the insured's business and the requirement that the liability must be to a person under a contract of service or apprenticeship with the insured². Other policies may exclude such liabilities as are usually covered by a different kind of insurance. Thus, in practice, a policy insuring against public liability does not include liability to employees³, that being a liability which can be covered by an employer's liability policy.

¹ As to exceptions generally see PARA 99 ante.

² See eg *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA (discussed at para 686 note 2 post).

³ Cf *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA; and see PARA 686 note 2 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iii) Special Features/666. Calculation of premium.

(iii) Special Features

666. Calculation of premium.

Where an insurance, whether against public liability or against employer's liability, is issued in relation to the carrying on of a business, the probability of accidents occurring, and also of liability consequent on those accidents arising, depends upon the size of the business¹. The greater the number of persons employed, or the number of appliances or vehicles used, the greater is the chance of accident. In practice, therefore, a definite lump sum premium is not charged. A premium is, in the ordinary way, payable at the commencement of the insurance, but this is a provisional premium only. The premium ultimately payable is fixed by data derived from the whole of the year of insurance, such as the amount of wages paid, or the number of persons employed, or of vehicles used, and provision is made for adjustment at the end of the year. For this purpose, the insured is required to keep a proper record, such as, for instance, if the premium is based on wages, a wages book², and at the end of the year he must furnish the insurers with an account from which the premium properly payable can be calculated³.

¹ See *Smellie v British General Insurance Co* [1918] WC & Ins Rep 233 (where the smallness of premium indicated the limited scope of the insurance).

² *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA (where the stipulation requiring a wages book to be kept was held not to be a condition precedent to liability).

³ This obligation may arise even if the insurance has come to an end: *General Accident Assurance Corpn Ltd v Day* (1904) 21 TLR 88.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iii) Special Features/667. Duties of insured in relation to claims.

667. Duties of insured in relation to claims.

Unless admitted, liability to a third party is likely to be enforced by an action brought by the third party, and upon the result of this action will depend the amount which the insurers have in their turn to pay as an indemnity to their insured. There is considerable danger that they may be prejudiced by his acts or omissions in defending any action. In practice, therefore, in addition to the usual duties imposed upon an insured making a claim under a policy¹, the policy makes it the insured's duty to give the insurers full information about any claim made against him by a third party, and requires him to forward to them any letters or documents received from the third party². He is also prohibited by the terms of the policy from settling any claim by a third party³ or making any admission of liability⁴ without the insurers' consent; and they are given power, if they think fit, to take over the defence of any proceedings that may be brought against the insured⁵.

1 As to claims under policies see generally para 170 et seq ante. Where the policy is a claims made policy (as to which see PARA 662 ante), notification is of particular significance as late notification may take the claim outside the relevant policy year. For claims obligations under liability policies see: *TSB Bank plc v Robert Irving & Burns (a firm) (Colonia Baltica Insurance Ltd, third party)* [2000] 2 All ER 826, [1999] Lloyd's Rep IR 528, CA; *Jacobs v Coster (t/a Newington Commercial Service Station)* [2000] Lloyd's Rep IR 506, CA; *John Wyeth Bros Ltd v Cigna Insurance Co of Europe SA-NV* [2001] EWCA Civ 175, [2001] Lloyd's Rep IR 420.

2 The precise effect of the requirement depends upon its form: *Wilkinson v Car and General Insurance Corp'n* (1913) 110 LT 468, DC.

3 If the insurers decline to take over the defence, they cannot afterwards complain of a bona fide settlement: *Captain Boyton's World's Water Show Syndicate Ltd v Employers' Liability Assurance Corp'n Ltd* (1895) 11 TLR 384, CA, per Lord Esher MR.

4 An admission of liability by an employee immediately after the accident is not within the prohibition unless the employee is authorised to make the admission: *Tustin v Arnold & Sons* (1915) 84 LJBK 2214; see also *Burr v Ware RDC* [1939] 2 All ER 688, CA.

5 As to the conduct of proceedings see PARAS 674-676 post.

UPDATE

667 Duties of insured in relation to claims

NOTE 1--Notification is a means of working out contractual rights, not of departing from them: *HLB Kidsons (a firm) v Lloyd's Underwriters subscribing to Lloyd's policy No 621/PK1D00101* [2008] EWCA Civ 1206, [2009] 2 All ER (Comm) 81 (price, or condition, of extension of claims made policy, which primarily insured claims within, but extended to claims outside, policy year, was giving of proper notice). See also *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62, [2009] All ER (D) 97 (Feb) (failure to inform insurer of escalating contract dispute did not breach notification of claim clause); and *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm), [2008] 2 All ER (Comm) 873 (insured obliged to inform insurer of fire when it occurred despite claim being made against insured three years later).

NOTE 2--The information must be provided in good time, regardless of whether the insurer would be prejudiced or not by the failure co-operate: *Shinedean Ltd v Alldown*

Demolition (London) Ltd (in liquidation) [2006] EWCA Civ 939, [2006] 2 All ER (Comm) 982.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iv) Extent of Indemnity/668. Full or partial indemnity; partial assumption of liability by the insured.

(iv) Extent of Indemnity

668. Full or partial indemnity; partial assumption of liability by the insured.

In some kinds of liability insurance, such as employer's liability insurance, the policy usually provides for a full indemnity against all liabilities falling within the scope of the policy which may be incurred by the insured during the currency of the policy. In the case of motor insurance, so far as compulsorily insurable risks are concerned, it seems that a policy which contains any limitation of the amount payable (except in the case of damage to property) would not comply with the statutory requirements¹. In other kinds of liability insurance, limitations are often imposed upon the amount recoverable so that the insured may not in fact receive a full indemnity². Provisions imposing limitations of liability may take various forms and examples are given in the following paragraphs³. The policy may contain a provision under which part of the liability insured against is to be borne by the insured himself. The provision may be framed to apply to all accidents, and the insured may agree to bear a specified proportion of the total liability; more usually the insured is made to assume, in respect of each individual accident, all liability up to a specified amount, in which case the insurers are liable for the excess only in each case⁴.

1 As to these statutory requirements see the Road Traffic Act 1988 s 145 (as amended); and PARA 733 et seq post. Policies containing such a limitation are not in practice issued.

2 The earlier cases as to limitation of the amount recoverable which arose out of motor insurance, although they may be no longer law in motor insurance, remain applicable to other kinds of liability insurance.

3 See PARAS 669-671 post.

4 See PARA 214 ante.

UPDATE

668 Full or partial indemnity; partial assumption of liability by the insured

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iv) Extent of Indemnity/669. Limitation of liability by reference to currency of policy.

669. Limitation of liability by reference to currency of policy.

The policy may fix the maximum total sum payable during the currency of the policy¹. The effect of a provision in this simple form is that, when accidents happen, the sums paid by the insurers in respect of the insured's liability are deducted from the maximum sum insured, and when that sum is exhausted the protection of the policy comes to an end².

¹ *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA; cf *British General Insurance Co v Mountain* (1919) 36 TLR 171 at 172, HL, where under the original policy there was a maximum liability for the year, as well as a maximum liability for each accident: 'liability not to exceed £750 for any one accident in any one year'. A policy may provide for a limitation on the maximum amount payable under each head of risk.

² As to the cessation of the policy on payment of the total sum insured see PARA 150 ante. The policy may, however, contain a provision for automatic renewal.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iv) Extent of Indemnity/670. Limitation by reference to any one accident.

670. Limitation by reference to any one accident.

Where a policy fixes the maximum sum payable in respect of any one accident, the limitation applies to the particular accident only; if there is another accident afterwards, the insured becomes again entitled to be indemnified up to the specified maximum, and the amount paid in respect of his liability for the previous accident is not to be taken into account¹. In considering the application of the limitation in this form, it is to be observed that the word 'accident' may be used in more than one sense. If several persons are injured by a mishap to a train, vehicle or bridge, the occurrence can in one sense be described as an accident to the train, vehicle or bridge, and there is in that sense one accident only; on the other hand, 'accident' may fall to be construed from the point of view of each individual victim², so as to produce, in effect, as many accidents (even in a single occurrence) as there are victims³. It is a question of construction in each case as to what 'accident' means; if it is construed as meaning accident to the person, the limitation of liability is to be taken to apply to the accident to each person and not to the accident to the vehicle or bridge, and the aggregate liability of the insurers is not limited to the maximum sum specified in the policy; on the contrary, they must indemnify the insured against his liability to each person injured, not exceeding in each case the specified maximum⁴.

1 *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA; see also *M'Kinlay v Life and Health Insurance Association* (1905) 13 SLT 102.

2 For the meaning of 'accident' in personal accident insurance see PARA 569 et seq ante.

3 *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402 at 407, CA, per Bowen LJ.

4 *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA, where the insurers were held liable to pay the total amount awarded to the various persons injured, namely £833, notwithstanding that the policy limited liability to '£250 in respect of any one accident'.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(iv) Extent of Indemnity/671. Limitation by reference to any one occurrence.

671. Limitation by reference to any one occurrence.

The policy may fix the maximum sum payable in respect of any accident or accidents arising out of the same occurrence¹. This form has been introduced to avoid the ambiguity latent in the word 'accident'², and it clearly shows that the limitation of liability is intended to apply to the accident to the vehicle or construction and not to the accidents to the various persons injured. In such a case, however many persons may have been injured in the same occurrence, only one maximum sum is payable³.

¹ See eg *Forney v Dominion Insurance Co Ltd* [1969] 3 All ER 831, [1969] 1 WLR 928 (professional indemnity policy); *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 (war risks); *Haydon v Lo & Lo* [1997] 1 WLR 198, [1997] 1 Lloyd's Rep 336, PC (professional indemnity); *Mann and Holt v Lexington Insurance Co* [2001] 1 All ER (Comm) 28, [2001] 1 Lloyd's Rep 1, CA (reinsurance, riot); *Countrywide Assured Group plc v AIG Europe (UK) Ltd* [2002] EWHC 2082 (Comm), [2003] 1 All ER (Comm) 237 (insurance against liability for mis-sold pensions).

² As to this ambiguity see PARA 670 ante.

³ *Allen v London Guarantee and Accident Co Ltd* (1912) 28 TLR 254.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(v) Indemnity Against Costs/672. Need for express provision as to costs.

(v) Indemnity Against Costs

672. Need for express provision as to costs.

It is open to question how far an insurance against third party liability confers liability against costs unless there is some specific reference to costs in the policy. Where the insured is held to be liable to the third party, and costs also are awarded against him, it is reasonably clear that his liability for costs is part of the legal liability to the third party, against which he is entitled to be indemnified¹. It is difficult to see how the same can be said of costs incurred in combating the claim, as these are expenses incurred by the insured, even though he may be under a legal liability in respect of them to his solicitor². If, however, the insured succeeds in his defence, and is held not to be liable to the third party, the event insured against, namely, liability to the third party, has not happened. The costs of the defence have been incurred, not as a consequence of any legal liability to the third party, but for the purpose of disproving its existence. In the absence, therefore, of some express provision in the policy, the costs of a successful defence are not covered, even though they were incurred with the consent of the insurers³. It is, however, possible to effect insurance specifically to cover legal expenses⁴.

1 See *Xenos v Fox* (1869) LR 4 CP 665 at 668, Ex Ch, per Cockburn CJ (marine insurance). As to the inclusion in professional negligence policies of provision for the payment of costs see PARA 694 post. As to the duty of motor insurers to satisfy judgments, including costs, in favour of third parties see PARA 748 post.

2 Cf *Xenos v Fox* (1869) LR 4 CP 665 at 668, Ex Ch, per Cockburn CJ.

3 *Xenos v Fox* (1869) LR 4 CP 665, Ex Ch.

4 As to legal expenses insurance see PARAS 805-807 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(v) Indemnity Against Costs/673. Provision normally made for costs.

673. Provision normally made for costs.

In practice, a policy of liability insurance always contains an express provision for indemnifying the insured in respect of costs of proceedings brought against the insured within the ambit of the policy. This provision covers not only any costs which may be awarded against the insured, but also any costs which he may incur in defending any claim which may be brought against him¹. The existence of such an indemnity against costs does not preclude the insured, if he is successful in the proceedings, from recovering his costs of defence from an unsuccessful third party².

1 *British General Insurance Co v Mountain* (1919) 36 TLR 171 at 172, HL, per Lord Birkenhead LC; *Poole Harbour Yacht Club Marina Ltd v Excess Insurance Co Ltd* [2001] Lloyd's Rep IR 580; *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All ER 489, [2000] Lloyd's Rep IR 590. See also PARA 676 text to notes 4-6 post.

2 *Cornish v Lynch* (1910) 3 BWCC 343, CA. In addition, the indemnity usually covers the costs of legal representation at any inquest or magistrates' court proceedings arising out of the accident. As to legal expenses see PARAS 805-807 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vi) Conduct of Proceedings/674. Right of insurers to intervene in own name.

(vi) Conduct of Proceedings

674. Right of insurers to intervene in own name.

If an action by a third party is proceeding against the insured, the insurers are not entitled to make any application in the action in their own name¹ unless they have been made parties to the action². The court has a general power³ to join an insurer as a third party to an action whenever in its discretion it thinks it right to do so; it is a question of the balance of convenience⁴. If judgment in default against the insured has been obtained in such an action, and the insurers are by statute⁵ liable to pay the amount of the judgment to the claimant, the insurers are entitled to apply⁶, as persons interested, to have the judgment set aside, even though they were not parties to the action⁷.

1 As to the right of insurers to conduct the defence of proceedings in the name of the insured by virtue of a term in the policy see PARA 675 post.

2 *Murfin v Ashbridge and Martin* [1941] 1 All ER 231, CA.

3 As to the extension of proceedings to parties not original parties to the claim see CPR Pt 20; and CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

4 *Brice v J H Wackerbarth (Australasia) Pty Ltd* [1974] 2 Lloyd's Rep 274 at 276, CA, per Lord Denning MR, and at 277 per Roskill LJ; *Walker and Knight v Donne, Mileham and Haddock (a firm)* (1976) Times, 9 November, CA, per Roskill LJ.

5 Eg by virtue of the Road Traffic Act 1988 ss 151, 152 (both as amended); see PARA 748 post.

6 Ie under CPR 40.9: see CIVIL PROCEDURE vol 12 (2009) PARA 1143.

7 *Windsor v Chalcraft* [1939] 1 KB 279, [1938] 2 All ER 751, CA.

UPDATE

674 Right of insurers to intervene in own name

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--CPR Pt 20 substituted: SI 2005/3515.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vi) Conduct of Proceedings/675. Policy conditions as to conduct of proceedings.

675. Policy conditions as to conduct of proceedings.

The policy usually empowers the insurers to take over, in the name and on behalf of the insured, the conduct and control of the defence of proceedings within the ambit of the policy brought against him. This power enables the insurers to settle the proceedings without consulting the insured, and they can then recover from him any portion of the agreed damages which under the policy he has to bear¹. The exercise of this power does not involve the insurers in any liabilities to the third party, and they do not make themselves responsible to him for payment of the amount at which the liability of the insured has been assessed².

1 *Beacon Insurance Co Ltd v Langdale* [1939] 4 All ER 204, CA.

2 *Nairn v South East Lancashire Insurance Co* 1930 SC 606.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vi) Conduct of Proceedings/676. Liability of insurers who conduct defence.

676. Liability of insurers who conduct defence.

It is the duty of the insurers to the insured, if they undertake the defence, to conduct it properly. If by any negligence on their part the defence is improperly conducted, and the damages awarded against the insured are accordingly increased, they are liable to make good to him the amount of the increase, and it is immaterial that it is in excess of the maximum sum insured¹. Similarly, even if they are nominated by the insurers, solicitors acting on behalf of the insured must recognise that the insured is their client, and without clear authority in the policy, they may not put on the record in his name a defence with which he does not agree². If, on the other hand, the insured is allowed to conduct the defence himself, he may be required to obtain the insurers' consent before incurring any costs, and in such a case costs incurred without their consent will not be recoverable³.

As regards the costs which may be awarded against the insured in the proceedings, the court has power to determine by whom and to what extent the costs of any proceedings are to be paid⁴. The court may order that they be paid by a non-party to the action but will only do so in exceptional circumstances⁵. If, however the insurers are made liable for the costs their liability is not limited by the limit of their indemnity of the insured⁶.

By assuming or continuing the defence of proceedings against the insured with full knowledge of the circumstances, the insurers may be precluded from disputing their liability to the insured⁷.

1 *Patteson v Northern Accident Insurance Co Ltd* [1901] IR 262.

2 *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA (in which the insured regarded the defence as a libel upon him).

3 *British General Insurance Co v Mountain* (1919) 36 TLR 171, HL. Consent may be implied from conduct: *E Hulton & Co v Mountain* (1921) 37 TLR 869, CA.

4 Supreme Court Act 1981 s 51(1) (substituted by Courts and Legal Services Act 1990 s 4). See generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

5 *Chapman (TGA) Ltd v Christopher* [1998] 2 All ER 873, [1998] 1 WLR 12, CA.

6 *Chapman (TGA) Ltd v Christopher* [1998] 2 All ER 873, [1998] 1 WLR 12, CA; cf *Bristol and West plc v Bhadesa (No 2)*, *Bristol and West plc v Mascarenhas (No 2)* [1999] Lloyd's Rep IR 138; *Citibank NA v Excess Insurance Co Ltd* [1999] Lloyd's Rep IR 122; *Gloucestershire Health Authority v MA Torpy and Partners Ltd (t/a Torpy and Partners)* [1999] Lloyd's Rep IR 203; *Adcock v Co-operative Insurance Society Ltd* [2000] Lloyd's Rep IR 657, CA; *Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398, CA; *Monckton Court Ltd v Perry Prowse (Insurance Services) Ltd* [2002] Lloyd's Rep IR 408.

7 *Etchells, Congdon and Muir Ltd v Eagle Star and British Dominions Insurance Co Ltd* (1928) 72 Sol Jo 242; cf *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 50 TLR 528, CA.

UPDATE

676 Liability of insurers who conduct defence

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/677. Injured party not subrogated at common law.

(vii) Subrogation of Injured Party

677. Injured party not subrogated at common law.

At common law, where a person insured under a liability insurance policy became legally liable for injury or damage sustained by a third party, the third party, not being a party to the contract of insurance, had no right either to proceed directly against the insurers, or to attach, by garnishee proceedings or otherwise, the money payable by the insurers to the insured. Equity did not put that third party in any better position, either in relation to the insurers, if they still held the money, or in relation to the insured, if he had been paid. In the event, therefore, of the insured's insolvency, the policy money became part of his general assets and even where the policy money formed the whole of the assets the third party ranked as an ordinary creditor only¹. Consequently, a position of great hardship was created, and this led to the progressive introduction of a limited system of statutory subrogation, by which, in the event of the insolvency of the insured, the third party was entitled to be paid the policy money and, if necessary, to enforce the policy against the insurers².

¹ *Re Harrington Motor Co, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA; see generally *Re Law Guarantee Trust and Accident Society, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA.

² As to statutory subrogation see PARA 678 et seq post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/678. Introduction of statutory subrogation.

678. Introduction of statutory subrogation.

In 1897 a statutory right of subrogation against an employer's insurers was given, in the event of the insolvency of the employer, to a workman who had a claim for compensation under the former system of workmen's compensation¹; and a general scheme of statutory subrogation against insurers of third party risks in the case of the insolvency of the insured was established by the Third Parties (Rights against Insurers) Act 1930².

Specialised forms of statutory subrogation have been introduced in relation to motor insurance³, and in favour of the insured, in case of the insolvency of the insurers, where there has been reinsurance of war risks in respect of ships, aircraft and cargoes with the Secretary of State⁴.

1 Workmen's Compensation Act 1897 s 5 (repealed).

2 See PARAS 679-684 post.

3 See PARAS 746-749 post.

4 See PARA 813 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/679. Application of statutory scheme of subrogation.

679. Application of statutory scheme of subrogation.

A right of subrogation arises where, under any contract of insurance¹, the insured is insured against liabilities to third parties² which he may incur and one of the following events occurs:

- 163 (1) the insured becomes bankrupt or makes a composition or arrangement with his creditors³; or
- 164 (2) in the case of the insured being a company or a limited liability partnership⁴, a winding-up order or an administration order is made, or a resolution for a voluntary winding up is passed⁵, with respect to the company or limited liability partnership, or a receiver or manager of the company's business or undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge or of a voluntary arrangement approved under the Insolvency Act 1986⁶.

If, either before or after the event in question, any liability to a third party is incurred by the insured, then, notwithstanding anything in any Act or rule of law to the contrary, his rights against the insurers under the contract in respect of the liability are transferred to and vest in the third party to whom the liability was incurred⁷. Where an order is made⁸ for the administration of the estate of a deceased debtor if any debt provable in bankruptcy⁹ is owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party, the deceased debtor's rights against the insurers under the contract in respect of that liability are, notwithstanding anything in any such order, transferred to and vest in the person to whom the debt is owing¹⁰.

The third party has no right of action against the insurers if the insured has already been wound up and dissolved¹¹. The third party must claim within the limitation period¹².

1 A contract of insurance for this purpose does not include a contract of reinsurance: see the Third Parties (Rights against Insurers) Act 1930 s 1(5); and note 2 infra. It does not include legal expenses insurance: *Tarback v Avon Insurance plc* [2002] QB 571, [2001] 2 All ER 503. The Third Parties (Rights against Insurers) Act 1930 does not apply in the case of compulsory insurance against liability for pollution by oil: Merchant Shipping Act 1995 s 165(5). As to this compulsory insurance see PARA 219 ante. Under the provisions of the former Workmen's Compensation Acts, which conferred a special statutory right of subrogation, questions arose, in certain cases where employers were members of mutual indemnity companies, as to whether what in fact existed was a contract of insurance or merely an arrangement by which in effect the indemnity company paid compensation to the workmen out of money provided by the employers: see eg *Pailin v Northern Employers' Mutual Indemnity Co* [1925] 2 KB 73, CA; *Hindmarch v Carterthorne Colliery Ltd and Durham Colliery Owners' Mutual Protection Association* (1928) 21 BWCC 44, CA; *Wooding v Monmouthshire and South Wales Mutual Indemnity Society Ltd* [1939] 4 All ER 570, HL. It is possible that a similar question might arise under the Third Parties (Rights against Insurers) Act 1930 s 1 (as amended).

2 For this purpose, liabilities to third parties, in relation to an insured person, do not include any liability of that person in the capacity of insurer under another contract of insurance: *ibid* s 1(5). It seems that, subject to this exception, liabilities to third parties include liabilities in contract as well as liabilities in tort, so that, eg in the case of an insurance by a bailee, if one of the events giving rise to a right of subrogation occurs, the bailor will be entitled to be subrogated to the bailee's rights against the bailee's insurers, whether the bailee's liability to the bailor arises in tort or contract; cf *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 584, CA, per Mellish LJ.

3 Third Parties (Rights against Insurers) Act 1930 s 1(1)(a). See eg *M/S Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Ltd* [1989] 1 Lloyd's Rep 289. The event of the insured becoming insolvent

must first occur before the Act confers on third parties any rights against insurers of third parties: *Normid Housing Association Ltd v Ralphs* [1989] 1 Lloyd's Rep 265 at 272-273, CA, per Slade LJ.

4 Third Parties (Rights against Insurers) Act 1930 s 3A(1) (added by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 2). As to limited liability partnerships see PARTNERSHIP vol 79 (2008) PARA 234.

5 The Third Parties (Rights against Insurers) Act 1930 does not apply where a company is wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company: s 1(6)(a). In its application to limited liability partnerships references to a resolution for a voluntary winding up being passed are references to a determination for a voluntary winding up being made: s 3A(2) (added by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 2). As to winding up generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 432 et seq.

6 Third Parties (Rights against Insurers) Act 1930 s 1(1)(b) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 7(2); and the Insolvency Act 1986 s 439(2), Sch 14).

7 Third Parties (Rights against Insurers) Act 1930 s 1(1). As to the effect of the transfer see PARA 681 post.

8 le under the Insolvency Act 1986 s 421 (as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 823-824.

9 As to the debts which are provable in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 490 et seq.

10 Third Parties (Rights against Insurers) Act 1930 s 1(2) (amended by the Insolvency Act 1985 Sch 8 para 7(2); and the Insolvency Act 1986 Sch 14).

11 *Bradley v Eagle Star Insurance Co Ltd* [1988] 2 Lloyd's Rep 233.

12 *Lefevre v White* [1990] 1 Lloyd's Rep 569; *Matadeen v Caribbean Insurance Co Ltd* [2002] UKPC 69, [2003] 1 WLR 670.

UPDATE

679 Application of statutory scheme of subrogation

NOTE 2--Contractual liabilities to third parties in both debt and damages are in principle liabilities to third parties for the purposes of the 1930 Act s 1; the specific terms of the insurance will determine whether the Act applies to a particular case: *Re OT Computers Ltd (in administration)* [2004] EWCA Civ 653, [2004] Ch 317.

TEXT AND NOTE 6--In head (2) reference to an administration order omitted and refers also to the company entering into administration: 1930 Act s 1(1)(b) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/680. Invalidity of provisions terminating insurance on insolvency.

680. Invalidity of provisions terminating insurance on insolvency.

Any contract of insurance made in respect of any liability of the insured to third parties is of no effect in so far as it purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties under it in the event of the insured becoming insolvent¹ or of the making of an order² for the administration of his estate in bankruptcy³.

¹ See on the happening to the insured of any of the events specified in the Third Parties (Rights against Insurers) Act 1930 s 1(1)(a), (b) (as amended): see PARA 679 text to notes 3-6 ante.

² See under the Insolvency Act 1986 s 421 (as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 823-824.

³ Third Parties (Rights against Insurers) Act 1930 s 1(3) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 7(2); and the Insolvency Act 1986 s 439(2), Sch 14).

UPDATE

680 Invalidity of provisions terminating insurance on insolvency

NOTE 3--See *Centre Reinsurance International Co v Freakley* [2005] EWCA Civ 115, [2005] 2 All ER (Comm) 65 (decision reversed on other grounds [2006] UKHL 45, [2006] All ER (D) 121 (Oct) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 251)).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/681. Extent of subrogation.

681. Extent of subrogation.

The rights transferred to the third party under the Third Parties (Rights against Insurers) Act 1930 are the rights of the insured against the insurers under the contract of insurance in respect of the liability in question; rights which are not referable to that liability are not transferred¹. In order that the statutory transfer may be effective, it is necessary, unless the claim is validly admitted, to establish the liability of the insured either by judgment of the court or by an award in an arbitration².

Upon a transfer of rights, the insurers are, in general, under the same liability to the third party as they would have been to the insured³. If, however, the liability of the insurers to the insured exceeds the liability of the insured to the third party, the insured retains his rights against the insurers in respect of the excess⁴; except where this provision applies, it seems that the effect of the statutory transfer of rights is that the insurers are not under any liability either to the trustee in bankruptcy of the insured where the insured is bankrupt⁵, or to the general creditors⁶ of the insured, but only to the third party⁷. In the case of compulsory motor insurance, it is expressly provided that the statutory transfer of rights against the insurers does not affect the liability of the insured to the third party⁸. In other cases, if the liability of the insurers to the insured is less than the liability of the insured to the third party, the third party retains his rights against the insured in respect of the balance⁹.

1 *Murray v Legal and General Assurance Society Ltd* [1970] 2 QB 495, [1969] 3 All ER 794; *Farrell v Federated Employers Insurance Association Ltd* [1970] 2 Lloyd's Rep 170, CA. Thus where the insured, because of failure to comply with a prior payment condition, had no rights against the insurers there could be no rights capable of transfer to the third party: *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1990] 2 All ER 705, [1990] 2 Lloyd's Rep 191, HL.

2 *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 at 373-374, [1967] 1 All ER 577 at 579, CA, per Lord Denning MR, and at 377-378 and 582 per Salmon LJ, approving the statement of Devlin J in *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825, [1957] 1 WLR 45 at 49. Liability is not established until damages are assessed: *Burns v Shuttlehurst Ltd* [1999] 2 All ER 27, [1999] 1 WLR 1449, CA.

3 Third Parties (Rights against Insurers) Act 1930 s 1(4). As to the avoidance as against third parties of settlements made between the insurers and the insured see PARA 684 post. For the principle that the insurers are in general liable to the third party only if, apart from the insured's insolvency, they would have been liable to the insured see PARA 682 post. As to the duty of insurers in the case of compulsory motor vehicle insurance to satisfy judgments obtained by third parties, even though the insurers may be entitled to cancel or avoid the policy, see PARA 748 post. For the principle that the conditions of the policy are in general binding on the third party see PARA 682 post. As to the avoidance as against third parties of certain conditions in motor vehicle insurance see PARAS 742-745 post.

4 *Ibid* s 1(4)(a). The trustees, liquidator, receiver, manager or administrator, as the case may be, will hold the excess on behalf of the creditors of the insured.

5 See *Craig v Royal Insurance Co Ltd* (1914) 84 LJKB 333 (a decision under the former Workmen's Compensation Acts).

6 See *King v Phoenix Assurance Co* [1910] 2 KB 666 at 669-670, CA, per Cozens-Hardy MR; *Daff v Midland Colliery Owners' Indemnity Co* (1913) 82 LJKB 1340 at 1347, HL, per Lord Dunedin (decisions in relation to the subrogation provisions in the former Workmen's Compensation Acts).

7 See *Craig v Royal Insurance Co Ltd* (1914) 84 LJKB 333 (a decision under the former Workmen's Compensation Acts).

8 See the Road Traffic Act 1988 s 153; and PARA 745 post.

9 Third Parties (Rights against Insurers) Act 1930 s 1(4)(b).

UPDATE

681-682 Extent of subrogation, Necessity that policy should have been enforceable by insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/682. Necessity that policy should have been enforceable by insured.

682. Necessity that policy should have been enforceable by insured.

Subject to the provisions rendering invalid against third parties certain settlements made between the insurers and the insured¹, and subject, in the case of compulsory motor insurance, to certain provisions which may impose on insurers the duty of satisfying judgments obtained in favour of third parties, even though the insurers may be entitled to avoid or cancel the policy², and which render invalid certain conditions in policies³, the insurers are not liable to the third party unless they would have been liable to the insured if the statutory transfer had not taken place⁴. If the policy was obtained by material non-disclosure, misrepresentation or fraud on the part of the insured, the third party cannot recover against the insurers⁵.

The fact that the insurers go into liquidation, whether before⁶ or after⁷ the bankruptcy of the insured, does not, it seems, prevent the statutory transfer from taking effect⁸. The conditions of the contract of insurance, other than conditions purporting to avoid or alter the contract in the event of the insured's insolvency⁹ or precluding third parties from obtaining information as to the existence of the policy¹⁰, or conditions rendered invalid against third parties in the case of motor insurance¹¹, are binding on the third party; he is therefore bound by an arbitration clause¹².

1 See the Third Parties (Rights against Insurers) Act 1930 s 3 (as amended); and PARA 684 post.

2 See the Road Traffic Act 1988 ss 151, 152 (both as amended); and PARA 746 post.

3 See *ibid* s 148 (as amended); and PARA 743 post.

4 *Hassett v Legal and General Assurance Society Ltd* (1939) 63 Ll L Rep 278; see also *Morris v Northern Employers' Mutual Indemnity Co* (1902) 71 LjKB 733 at 735, CA (a decision under the former Workmen's Compensation Acts); *Farrell v Federated Employers' Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769. See also *CVG Siderurgica del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd* [1979] 1 Lloyd's Rep 557.

5 *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 50 TLR 528, CA. The application of this decision in relation to motor insurance has been affected by statute (see the Road Traffic Act 1988 ss 151, 152 (both as amended); and PARAS 750-751 post), but it is still an authority on the effect of statutory subrogation generally.

6 See *Re Renishaw Iron Co Ltd* [1917] 1 Ch 199 (a decision in relation to the subrogation provisions contained in the former Workmen's Compensation Acts). As to the invalidity against third parties of compromises between the insurers and the insured see PARA 684 post.

7 See *Re Pethick, Dix & Co, Burrows' Claim* [1915] 1 Ch 26 (a decision in relation to the subrogation provisions contained in the former Workmen's Compensation Acts).

8 The liability of the insurers is, it seems, ascertained at the date of their liquidation: see *Re Law Car and General Insurance Corp Ltd* (1913) 110 LT 27 (a decision in relation to the subrogation provisions contained in the former Workmen's Compensation Acts).

9 As to the invalidity of conditions to this effect see the Third Parties (Rights against Insurers) Act 1930 s 1(3) (as amended); and PARA 680 ante.

10 As to the invalidity of provisions purporting to avoid a contract or to alter rights on the giving of information to third parties see the Third Parties (Rights against Insurers) Act 1930 s 2(1) (as amended); and PARA 683 post.

11 See the Road Traffic Act 1988 s 148 (as amended); and PARA 743 post.

12 See PARA 188 note 2 ante.

UPDATE

681-682 Extent of subrogation, Necessity that policy should have been enforceable by insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/683. Duty to give information to third parties.

683. Duty to give information to third parties.

In the event of:

- 165 (1) a person becoming bankrupt;
- 166 (2) a person making a composition or arrangement with his creditors;
- 167 (3) an order being made for the administration of the estate of a deceased insolvent debtor¹;
- 168 (4) a winding up order or an administration order being made, or a resolution for a voluntary winding up being passed, with respect to a company²;
- 169 (5) a receiver or manager of a company's business or undertaking being duly appointed; or
- 170 (6) possession being taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the charge,

it is the duty of such a person or company³ to give at the request of any party claiming that that person or company is under a liability to him, such information as may reasonably be required by the party so claiming for the purpose of:

- 171 (a) ascertaining whether any rights have been transferred to and vested in him by the Third Parties (Rights against Insurers) Act 1930⁴; and
- 172 (b) enforcing such rights, if any⁵.

In so far as any contract of insurance purports, directly or indirectly, to avoid the contract or to alter the rights of the parties under it, upon the giving of any such information in the above events, or otherwise to prohibit or prevent the giving of such information in those events, it is of no effect⁶.

If the information given to any person in pursuance of the statutory requirement discloses reasonable ground for supposing that there have or may have been transferred to him under the statutory provisions rights against any particular insurer, that insurer is subject to the same duty of disclosure as is imposed on the persons previously mentioned⁷. The duty to give information includes a duty to allow all contracts of insurance, receipts for premiums and other relevant documents in the possession or power of the person on whom the duty is imposed to be inspected and copies of them to be taken⁸.

¹ I.e. an order under the Insolvency Act 1986 s 421 (as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 823-824.

² The Third Parties (Rights against Insurers) Act 1930 applies to limited liability partnerships as it applies to companies and in its application to them references to a resolution for a winding up resolution being passed are references to a determination for a voluntary winding up being made: s 3A (added by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 2).

³ I.e. the bankrupt, debtor, personal representative of the deceased debtor, or the company, and, as the case may be, of the trustee in bankruptcy, trustee, liquidator, administrator, receiver or manager or person in the possession of the property. The reference to a 'trustee' includes a reference to the supervisor of a voluntary arrangement proposed for, and approved under, the Insolvency Act 1986 Pt I (ss 1-7) (as amended) or Pt VIII (ss

252-263) (as amended): Third Parties (Rights against Insurers) Act 1930 s 2(1A) (added by the Insolvency Act 1985 s 235(1), Sch 8 para 7(3)(b); amended by the Insolvency Act 1986 s 439(2), Sch 14).

4 As to the rights transferred by the Third Parties (Rights against Insurers) Act 1930 see PARAS 679-682 ante.

5 Ibid s 2(1) (amended by the Insolvency Act 1985 Sch 8 para 7(3)(a); and the Insolvency Act 1986 Sch 14). A claimant whose claim has not been quantified (as to which see PARA 681 text and note 2 ante) is not entitled to disclosure before commencement of an action under the Supreme Court Act s 33(2) (as amended); once the claim is quantified the right to disclosure under the Third Parties (Rights against Insurers) Act 1930 s 2(1) (as amended) arises: *Burns v Shuttlehurst Ltd* [1999] 2 All ER 27, [1999] 1 WLR 1449, CA.

6 Third Parties (Rights against Insurers) Act 1930 s 2(1) (as amended: see note 5 supra).

7 Ibid s 2(2).

8 Ibid s 2(3).

UPDATE

683 Duty to give information to third parties

TEXT AND NOTE 2--In head (4) reference to an administration order omitted, and refers also to a company entering into administration: 1930 Act s 2(1) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096).

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(1) IN GENERAL/(vii) Subrogation of Injured Party/684. Settlement between insurers and insured.

684. Settlement between insurers and insured.

Where the insured has become bankrupt, or where, the insured being a company or a limited liability partnership, a winding up order has been made or a resolution, (or in the case of a limited liability partnership, a determination) for a voluntary winding up has been passed, no agreement made between the insurers and the insured after liability has been incurred to a third party and after the commencement of the bankruptcy or the winding up¹, and no waiver, assignment or other disposition made by, or payment made to, the insured after the commencement of the bankruptcy or winding up, is effective to defeat or affect the rights transferred to the third party by the Third Parties (Rights against Insurers) Act 1930², but those rights are the same as if no such agreement, waiver, assignment, disposition or payment had been made³.

1 As to the date when a bankruptcy is deemed to commence see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 213. As to the date of commencement of winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 489.

2 As to the rights transferred by the Third Parties (Rights against Insurers) Act 1930 see PARAS 679-682 ante.

3 Ibid s 3 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 7(4)); Third Parties (Rights against Insurers) Act 1930 s 3A (added by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 2).

UPDATE

684 Settlement between insurers and insured

NOTE 3--A compromise arrangement between the insurers and the insured's creditors, approved by a statutory majority and sanction by the court, may be effective to defeat the rights transferred by the 1930 Act: *Re T&N Ltd (No 3)* [2006] EWHC 1447 (Ch), [2007] 1 All ER 851.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(2) EMPLOYER'S LIABILITY INSURANCE/685. Compulsory insurance.

(2) EMPLOYER'S LIABILITY INSURANCE

685. Compulsory insurance.

Every employer carrying on any business in Great Britain must insure and maintain insurance under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment in Great Britain in that business¹. Provision is made by regulations for securing that certificates of insurance in the prescribed form and containing the prescribed particulars are issued by insurers to employers². An employer must comply with regulations as to the display of copies of the certificate³.

1 Employers' Liability (Compulsory Insurance) Act 1969 s 1(1). For the meanings of 'business', 'approved policy', 'authorised insurer', 'employee' and 'Great Britain' in that Act see EMPLOYMENT vol 39 (2009) PARAS 12, 40. As to the requirements relating to the insurance to be effected see EMPLOYMENT vol 39 (2009) PARA 40 et seq.

2 See *ibid* s 4(1); and EMPLOYMENT vol 39 (2009) PARA 45.

3 See *ibid* s 4(2)(a); and EMPLOYMENT vol 39 (2009) PARA 45.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(2) EMPLOYER'S LIABILITY INSURANCE/686. Form of employer's liability insurance.

686. Form of employer's liability insurance.

A policy of employer's liability insurance usually provides that if any person under a contract of service or apprenticeship with the insured sustains any personal injury by accident or disease caused during the period of insurance and arising out of and in the course of his employment¹ by the insured in the business which has been specified, and if the insured becomes liable to pay damages for that injury or disease, the insurers are to indemnify the insured against all sums for which the insured is so liable².

¹ As to the meaning of 'arising out of and in the course of his employment' see *Vandyke v Fender (Sun Insurance Office Ltd, third party)* [1970] 2 QB 292, [1970] 2 All ER 335, CA; *Stitt v Woolley* (1971) 115 Sol Jo 708, CA; *Paterson v Costain* [1979] 2 Lloyd's Rep 204; and EMPLOYMENT vol 39 (2009) PARA 40.

² See eg the form of policy cited in *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437 at 438, [1955] 2 All ER 561 at 563, CA. An employer's liability policy is capable of being enforced by an undisclosed principal: *Siu Yin Kwan (Administratrix of the Estate of Chan Ying Lung) v Eastern Insurance Co Ltd* [1994] 2 WLR 370, PC (where policy taken out in the name of shipping agents did not name employers, employers could nevertheless have enforced it). As to employers' liability for injuries suffered by employees see generally EMPLOYMENT vol 39 (2009) PARA 32 et seq. For general provisions as to the health, safety and welfare of employees see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 412 et seq. Where contractors were insured under an employer's liability policy containing an express stipulation limiting the insurance to cases where there is a contract of service or apprenticeship with the insured, and also under a public liability policy covering death or injury to persons other than persons under a contract of service or apprenticeship with them, and an unskilled labourer temporarily lent to them by a firm for which they were doing work was killed as a result of their negligence, they were held to be entitled to indemnity under the public liability policy and not under the employer's liability policy, as the labourer was not under a contract of service with them but with the firm for which they were doing the work: *Denham v Midland Employers' Mutual Assurance Ltd* supra; see also *Etchells, Congdon and Muir Ltd v Eagle, Star and British Dominions Insurance Co Ltd* (1928) 72 Sol Jo 242. It seems that liability to employees of sub-contractors, or to an independent contractor who has a contract to render services, would also in such a case be regarded as falling within the ambit of public liability insurance. As to the distinction between a contract of service and a contract for services see *Simmons v Heath Laundry Co* [1910] 1 KB 543, CA; *Wardell v Kent County Council* [1938] 2 KB 768, [1938] 3 All ER 473, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(2) EMPLOYER'S LIABILITY INSURANCE/687. Identification of business of insured.

687. Identification of business of insured.

A proposal for insurance against employer's liability usually contains a question as to the employer's trade or occupation. If the question is not accurately answered and the proposal is made the basis of the contract, the insurers will not be on risk at all unless an agent of theirs has knowledge of the true state of affairs and this knowledge can be imputed to them¹. If questions are asked in the proposal as to the use of explosives or other dangerous substances in the course of the employer's business, a negative answer will readily be construed as a description of the risk and may amount to a warranty that such substances will not be used².

¹ *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521. As to imputation of an agent's knowledge see PARAS 64-69 ante.

² *Beauchamp v National Mutual Indemnity Insurance Co Ltd* [1937] 3 All ER 19.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(2) EMPLOYER'S LIABILITY INSURANCE/688. Calculation of premiums.

688. Calculation of premiums.

It is usual to relate the premium to the amount paid in wages by the employer to his employees during each period of insurance, and to insert a provision for adjusting the premium at the end of the period when the figures can be accurately determined. To enable this to be done there is usually an express provision compelling the insured to keep a proper wages book, but it has been held that this is not to be regarded as a condition precedent¹. The remedy of the insurers, therefore, is limited to suing for an account².

1 *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, CA.

2 *General Accident Assurance Corp'n v Day* (1904) 21 TLR 88. An account was ordered to be taken in *Garthwaite v Rowland* (1948) 81 Ll L Rep 417.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(2) EMPLOYER'S LIABILITY INSURANCE/689. Obligation to take reasonable precautions.

689. Obligation to take reasonable precautions.

It is common to find in an employer's liability policy a condition requiring the insured to take reasonable precautions to prevent accidents¹, or to secure that all reasonable safeguards are provided and used². The scope of such a provision has been much discussed³, but it seems that it cannot be construed as taking away altogether, or even as seriously undermining, the cover which would otherwise be afforded against liability at common law, a liability which in its nature assumes the possibility of negligence⁴. It is a provision which, in any case, is stringently construed; it does not extend to negligence on the part of an employee of the insured⁵, and the safeguards referred to are limited to material safeguards⁶; nor, even if so described, is it necessarily regarded as a condition precedent⁷.

1 See eg *Woolfall and Rimmer Ltd v Moyle* [1942] 1 KB 66, [1941] 3 All ER 304, CA; *London Crystal Window Cleaning Co Ltd v National Mutual Indemnity Insurance Co Ltd* [1952] 2 Lloyd's Rep 360; *Fraser v B N Furman (Productions) Ltd (Miller Smith & Partners, third party)* [1967] 3 All ER 57, [1967] 1 WLR 898, CA; *Lane v Spratt* [1970] 2 QB 480, [1970] 1 All ER 162.

2 See eg *Concrete Ltd v Attenborough* (1939) 65 Ll L Rep 174.

3 See the cases cited in note 1 supra.

4 See *Beauchamp v National Mutual Indemnity Insurance Co Ltd* [1937] 3 All ER 19 at 23 per Finlay J.

5 *Woolfall and Rimmer Ltd v Moyle* [1942] 1 KB 66, [1941] 3 All ER 304, CA; *T F Maltby Ltd v Pelton Steamship Co Ltd* [1951] 2 All ER 954n.

6 *Concrete Ltd v Attenborough* (1939) 65 Ll L Rep 174.

7 *Pictorial Machinery Ltd v Nicholls* (1940) 164 LT 248.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(3) PUBLIC LIABILITY INSURANCE/690. Nature of public liability insurance.

(3) PUBLIC LIABILITY INSURANCE

690. Nature of public liability insurance.

The cover afforded by a public liability policy is normally an indemnity, usually with a pecuniary maximum as regards any one accident or as regards liability during any one period of insurance, against legal liability to members of the general public, as distinct from persons in the service of the insured or as distinct from such persons as members of the insured's family or household¹. Employer's liability and public liability may be covered in one policy, for example in a householder's comprehensive policy, but in the case of industrial concerns the two risks are usually separately insured². Public liability policies usually exclude liability for bodily injury sustained by employees or arising out of the use of vehicles, ships or aircraft or arising out of food or drink poisoning, and liabilities voluntarily assumed by contract. It is usual also to exclude losses caused by radioactive contamination³.

1 As to the scope of an employer's liability policy and the matters which fall to be covered by a public liability policy see PARA 686 ante. As to limitation by reference to any one accident see PARA 670 ante.

2 Employer's liability insurance is compulsory; see PARA 685 ante.

3 As to the statutory obligation to make funds available to satisfy claims in connection with nuclear installations see the Nuclear Installations Act 1969 (as amended).

UPDATE

690 Nature of public liability insurance

NOTE 1--See also *Bartoline Ltd v Royal & Sun Alliance Insurance plc* [2006] EWHC 3598 (QB), [2007] 1 All ER (Comm) 1043.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(3) PUBLIC LIABILITY INSURANCE/691. Terms and effect of public liability policy.

691. Terms and effect of public liability policy.

A public liability policy normally contains restrictions of liability by reference to the type of business carried on by the insured¹. Where a statement by the insured as to the methods used in carrying on that business is incorporated in the policy, the insurers may not be liable if an accident occurs while methods other than those stated are being used². The general principles of liability insurance which have been previously indicated³ are applicable to public liability insurance.

¹ See eg *South Staffordshire Tramways Co v Sickness and Accident Assurance Association* [1891] 1 QB 402, CA (tramway company); *Allen v London Guarantee and Accident Co Ltd* (1912) 28 TLR 254 (builder and contractor); *Concrete Ltd v Attenborough* (1939) 65 Ll L Rep 174 (builders); *Pictorial Machinery Ltd v Nicolls* (1940) 67 Ll L Rep 461 (printers' engineers and suppliers); *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA (artesian well and civil engineering contractors); *Captain Boyton's World's Water Show Syndicate Ltd v Employers' Liability Assurance Corp'n Ltd* (1895) 11 TLR 384, CA (showmen); *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp'n* [1974] QB 57, [1973] 3 All ER 825, CA (manufacturers of equipment for storage of liquids); *Pickford and Black Ltd v Canadian General Insurance Co* (1976) 64 DLR (3d) 179, Can SC (stevedores).

² See PARA 120 ante.

³ See PARA 660 et seq ante.

UPDATE

691 Terms and effect of public liability policy

NOTE 1--See also *Bedfordshire Police Authority v Constable* [2009] EWCA Civ 64, [2009] 2 All ER (Comm) 200 (entitlement of police authority to indemnity for compensation paid for riot damage).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/
(4) PROFESSIONAL INDEMNITY INSURANCE/692. Form of insurance.

(4) PROFESSIONAL INDEMNITY INSURANCE

692. Form of insurance.

The form of insurance which is normally obtainable from insurers against the consequences of professional negligence and breach of professional duty¹ provides in the main clause for indemnity against loss from any claim or claims which may be made against the insured in respect of any negligent act, error or omission on the part of the insured or any of his partners or employees in the conduct of the business of the insured as a professional person². The limitation by reference to the business is fundamental, as there may be wide variations of risk between one profession and another³. It is also fundamental, so far as the main clause of the cover is concerned⁴, that the policy is an indemnity policy. The insured must prove a loss and cannot recover anything, or even make a claim against the insurers, until he has been found liable and so sustained a loss⁵, unless the insuring clause is drafted to show in clear terms that this basic principle of liability insurance is intended to be excluded⁶.

1 As to liability for professional negligence see generally NEGLIGENCE.

2 See eg *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 823, [1957] 1 WLR 45 at 45. In *Haseldine v Hosken* [1933] 1 KB 822, CA, the policy covered loss arising from claims 'by reason of any neglect, omission or error'. In *Goddard and Smith v Frew* [1939] 4 All ER 358, CA, the policy covered loss arising from all actions, proceedings, claims and demands by reason of 'any act, neglect, omission, mis-statement or error'. For further examples see *Davies v Hosken* [1937] 3 All ER 192 (solicitor); *Whitworth v Hosken* (1939) 65 Ll L Rep 48 (accountant); *Simon Warrender Pty Ltd v Swain* [1960] 2 Lloyd's Rep 111, NSW SC (insurance broker); *Maxwell v Price* [1960] 2 Lloyd's Rep 155, Aust HC (solicitor; policy covering negligent act committed by a solicitor prior to his joining insured firm); *Webb and Hughes v Bracey* [1964] 1 Lloyd's Rep 465 (solicitor); *Forney v Dominion Insurance Co Ltd* [1969] 3 All ER 831, [1969] 1 WLR 928 (solicitor; meaning of 'occurrence' in policy with limit in respect of any claim or number of claims arising out of the same occurrence: see also PARA 671 ante); *Haydon v Lo & Lo* [1997] 1 WLR 198, [1997] 1 Lloyd's Rep 336, PC (solicitor; meaning of 'any one claim' where theft by employee from two clients on several occasions); *Rothschild (J) Assurance plc v Collyear* [1999] Lloyd's Rep IR 6, (1998) Times, 15 October (life insurance company; pensions mis-selling); *Countrywide Assured Group plc v AIG Europe (UK) Ltd* [2002] EWHC 2082 (Comm), [2003] 1 All ER (Comm) 237 (life insurance company; pensions mis-selling).

3 As to circumstances affecting the risk see generally paras 119-120 ante.

4 As to subsidiary clauses which are not indemnity clauses see PARA 694 post.

5 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825, [1957] 1 WLR 45 at 49 per Devlin J; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, [1967] 1 All ER 577, CA; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 at 964-966, [1989] 1 All ER 961 at 964-966, HL, per Lord Brandon of Oakbrook; *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All ER 489, [2000] 1 All ER (Comm) 486. As to the effect of the presence of a Queen's Counsel clause in the policy see PARAS 695-696 post.

6 *Thornton Springer v NEM Insurance Co Ltd* [2000] 2 All ER 489 at 501, [2000] 1 All ER (Comm) 486 at 497 per Colman J.

UPDATE

692 Form of insurance

NOTE 5--A global settlement which does not impose on the insured any identifiable loss in respect of any identifiable insured eventuality does not satisfy the requirement of

ascertainment of loss under a liability insurance policy: *Lumbermens Mutual Casualty Co v Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm), [2005] 2 All ER (Comm) 669.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/ (4) PROFESSIONAL INDEMNITY INSURANCE/693. Extent of the main indemnity clause.

693. Extent of the main indemnity clause.

The main indemnity clause operates where the proximate cause of the loss is a claim of the type specified in the policy¹. Thus, if the proximate cause of the loss is a criminal act by an employee of the insured, such as theft², or obtaining property by deception³, this cannot be regarded as a negligent act, error or omission, and the policy does not apply⁴. If it is desired to insure against losses arising from that sort of contingency, a fidelity policy is required; a liability policy cannot be made to serve the dual purpose⁵.

However the case may be framed against the insured by his client, it is the court's duty to ascertain by reference to the ascertainable facts what the real essence of the case is. This can normally be done by waiting until the liability on the part of the insured is made good; the nature of the findings will then be conclusive as between the insured and his insurers, because it is the liability, as ultimately found, of the insured which is the foundation of the liability of the insurers. If, however it may be framed, the client's case is found ultimately to rest upon the dishonesty of an employee of the insured, the insurers will not be liable under a professional negligence policy⁶.

1 *Goddard and Smith v Frew* [1939] 4 All ER 358 at 361, CA, per Scott LJ; see also *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 825, 831, [1957] 1 WLR 45 at 49-50, 58 per Devlin J, commenting on the dictum of Lindley LJ in *Reischer v Borwick* [1894] 2 QB 548 at 551, CA, to the effect that there may be two proximate causes; *MDIS Ltd v Swinbank* [1999] 2 All ER (Comm) 722, [1999] Lloyd's Rep IR 516, CA; *Lloyd's TSB General Insurance Holdings Ltd v Lloyd's Bank Group Insurance Co Ltd, Abbey National plc v Lee* [2001] EWCA Civ 1643, [2002] 1 All ER (Comm) 42, [2002] Lloyd's Rep IR 113. As to proximate cause of loss see PARAS 356-357 ante.

2 As to the nature of theft see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282 et seq.

3 As to the nature of obtaining property by deception see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 310.

4 *West Wake Price & Co v Ching* [1956] 3 All ER 821, [1957] 1 WLR 45. Cf *Simon Warrender Pty Ltd v Swain* [1960] 2 Lloyd's Rep 111, NSW SC.

5 *Goddard and Smith v Frew* [1939] 4 All ER 358 at 361, CA, per Scott LJ and Goddard LJ. As to fidelity insurance see PARAS 783-789 post.

6 See *West Wake Price & Co v Ching* [1956] 3 All ER 821, [1957] 1 WLR 45, where the court's duty was considered in relation to a policy containing a Queen's Counsel clause. See further PARA 696 post.

UPDATE

693 Extent of the main indemnity clause

NOTE 1--*Lloyds TSB General Insurance Holdings Ltd*, cited, reversed: [2003] UKHL 48, [2003] 4 All ER 43.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/ (4) PROFESSIONAL INDEMNITY INSURANCE/694. Subsidiary cover for the cost of legal proceedings.

694. Subsidiary cover for the cost of legal proceedings.

Policies covering professional negligence always include a provision for payment of the costs of legal proceedings. It would indeed be commercially impracticable for insurers to insist on liability being established against the insured before they are prepared to accept liability, and at the same time to expect the insured to bear the cost of contesting proceedings which he might well think were incontestable. A clause of this kind has been compared to the suing and labouring clause¹ in a policy of marine insurance. It is not part of the contract of strict indemnity, and performance of it by the insurers does not involve them in any liability; if the action succeeds, a loss will be proved, but it is still open to the insurers to assert that the loss is not within the policy². Part of the consideration for the contract is, however, that the insurers, if they insist on full proof, should bear the cost incurred. In other words, it is a case of a contingency insurance, the contingency being the making of the claim, and the sum to be paid in that contingency being the cost of contesting it³. A limit in a policy in respect of any claim or number of claims arising out of the same occurrence applies to all liability whether in respect of damages or costs⁴.

1 As to the suing and labouring clause see PARAS 435-438 ante. As to legal expenses insurance generally see PARAS 805-807 post.

2 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 50.

3 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 50-51.

4 *Forney v Dominion Insurance Co Ltd* [1969] 3 All ER 831, [1969] 1 WLR 928; see also PARA 671 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/
(4) PROFESSIONAL INDEMNITY INSURANCE/695. The effect of the Queen's Counsel clause.

695. The effect of the Queen's Counsel clause.

A professional man may object to facing litigation which, whether it is successful or not, may be damaging to his reputation¹. The generally accepted solution of this difficulty is found in a clause in a policy against liability for professional negligence which provides that a claim will be paid without requiring the insured to contest it unless a Queen's Counsel to be mutually agreed on advises that the claim can be contested successfully². In practice this means that the insurers have to pay unless the selected Queen's Counsel feels able to advise, not merely that there is a fair, or a reasonable, prospect of success, but that the balance is considerably weighted in favour of the insured's success³. The insurer's liability in such a case has been said to bear some similarity to the concept in marine insurance of constructive total loss⁴. The clause frequently further provides that the claim is not to be contested unless the insured consents, but that his consent is not to be unreasonably withheld⁵. The basic nature of the provision is essentially that of a contingency insurance, the contingency being the making of the claim and the circumstances making it reasonable not to contest it⁶.

1 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 828, [1957] 1 WLR 45 at 53.

2 For the form of such a clause see *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 823, [1957] 1 WLR 45 at 46. As to Queen's Counsel generally see LEGAL PROFESSIONS VOL 66 (2009) PARA 1124.

3 In *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 50-51, Devlin J expressed this by saying that 'it is more likely than not that there will be a loss, the question of likelihood being determined by a Queen's Counsel'. In practice, however, a mere balance of likelihood is not regarded by Queen's Counsel who advise in this capacity as sufficient; they will not normally allow a professional man to go to court unless they feel reasonably confident in the prospects of rebutting the charges.

4 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 50 per Devlin J. As to constructive total loss see PARA 468 et seq ante.

5 For the form of such a provision see *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 823, [1957] 1 WLR 45 at 46.

6 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 51 per Devlin J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/ (4) PROFESSIONAL INDEMNITY INSURANCE/696. The Queen's Counsel clause and the mixed claim.

696. The Queen's Counsel clause and the mixed claim.

As has been previously indicated¹, difficulties may arise wherever a claim can, so far as the client is concerned, be established without going outside the strict words of the policy as to a negligent act, error or omission, although the foundation of the claim may be dishonesty or criminality never contemplated as coming within such a policy at all². These difficulties are enhanced where the scope of the Queen's Counsel clause is under consideration, as in such a case there will obviously be no record or judgment in any proceedings by the client against the insured to be studied. The court, however, is not precluded by the form in which the claim is put forward, or the cause of action which is in fact pleaded, from seeking to ascertain what the real cause of the loss is³. If the result of this examination indicates that the claim can properly be described as a mixed claim, with elements of negligence and fraud or dishonesty inextricably intermingled, the Queen's Counsel clause does not apply⁴.

1 See PARA 693 ante.

2 As to the extent of the main indemnity clause see PARA 693 ante.

3 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 828, [1957] 1 WLR 45 at 53.

4 *West Wake Price & Co v Ching* [1956] 3 All ER 821, [1957] 1 WLR 45.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/
(4) PROFESSIONAL INDEMNITY INSURANCE/697. Criminal acts of the insured.

697. Criminal acts of the insured.

Apart from the question whether criminality on the part of an employee is covered by a professional negligence policy¹, the general rule of public policy is that a person cannot recover an indemnity under an insurance policy in respect of deliberate conduct on his part which is against the criminal law². Different considerations probably arise where a breach of the law, even of the criminal law, arises not so much from the inherent nature of something deliberately done, but from inadvertence, stupidity, ignorance or even reckless folly³.

1 As to this question see PARA 693 ante.

2 See PARA 693 ante; and as to the illegality of contracts to commit a legal wrong see generally CONTRACT vol 9(1) (Reissue) PARA 839. As to the application of the rule to life insurance see PARA 530 ante; and as to motor insurance see PARA 711 post.

3 Cf *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/698. Insurable interest of a bailee.

(5) BAILEE'S INSURANCE

698. Insurable interest of a bailee.

There are many different classes of commercial activity in which, from the point of view of the law, one person becomes a bailee of goods belonging to another. The commonest examples are a carrier (whether by sea, land, air, or any two or more of these means of transport), a wharfinger, a warehouseman, an artificer who does work on other people's goods, a pawnbroker and an innkeeper¹. One feature of the position under the common law of such a bailee is that he commonly has a lien for his charges or expenses, and by virtue of this lien he is accepted as having an insurable interest in the goods bailed, not merely to the extent of his charges or expenses as at any given date, but up to the full value of the goods². Furthermore, even if he has no lien, he has an insurable interest founded upon the commission³, profit⁴ or other advantages⁵ which he may expect to derive from the bailment, and in that case also he is entitled to insure up to the full value provided there is evidence to indicate that his intention was to cover, on behalf of the owner, the owner's interest over and above his own limited interest⁶.

1 As to bailees see generally BAILMENT. As to particular examples of bailees see eg CARRIAGE AND CARRIERS vol 7 (2008) PARAS 57, 756; LICENSING AND GAMBLING vol 67 (2008) PARA 183 et seq; PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 1 et seq.

2 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; *London and North Western Ry Co v Glyn* (1859) 1 E & E 652; *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25 at 31; *Maurice v Goldsbrough Mort & Co Ltd* [1939] AC 452 at 461-462, [1939] 3 All ER 63 at 68, PC; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL. See also *Ebsworth v Alliance Marine Insurance Co* (1873) LR 8 CP 596 at 629 per Bovill CJ and Denman J, where the court was equally divided as to the extent of the insurable interest, and the right to recover, of a consignee who had advanced money on the security of goods; on appeal in this case, by arrangement between the parties, the court ordered the damages entered for the consignees to be reduced to a sum representing their personal pecuniary interest (see (1874) 43 LJCP 394n). As to the authority of consignees to insure see PARA 279 text and note 6 ante. As to the principle that it is unnecessary for a bailee to describe his interest see PARA 617 ante. As to the principle that anything above the bailee's accrued costs, charges and expenses must be handed over to the owners of the goods see PARA 702 post.

3 *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ.

4 *Dalglish v Buchanan* (1854) 16 Durl 332, Ct of Sess.

5 *Trotter v Watson* (1869) LR 4 CP 434 at 444 per Bovill CJ (tenant of furnished house has insurable interest in the furniture).

6 *Castellain v Preston* (1883) 11 QBD 380 at 392, CA, per Bowen LJ. In *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL, the court doubted the existence of a rule allowing it to look behind the words of the policy in order to discover the intention of the bailees when they took out the policy. As to insurances for the benefit of several interests see PARAS 615 ante, 699 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/699. Legal liability of a bailee.

699. Legal liability of a bailee.

Quite apart from his interest by virtue of his lien or otherwise, unless there are special terms of his contract to the contrary, a bailee may be legally liable to the owner if the subject matter of the bailment is damaged or destroyed¹. The existence of this potential liability has equally been accepted as sufficient to provide the bailee with an insurable interest up to the full value². Again, where a bailee assumes the obligation to insure goods while in his possession, he will be answerable in damages if he fails to insure, and this obligation gives him an insurable interest up to the full value³. It is not always easy to determine whether a bailee is intending to insure other interests as well as his own, in which case rights of contribution might arise if the other interests are collaterally insured⁴, or whether he is insuring on a liability basis so as to preclude any question of contribution, at any rate so far as insurers of different interests are concerned⁵. Sometimes the policy makes it clear whether the insurance is on a title basis, so that as regards any proceeds over and above his own limited interest the bailee holds as trustee for the owner, or on a liability basis, so that the limit of the bailee's right of recovery is to the extent of his liability, if any, to the owner⁶. Often, however, this ambiguity is left unresolved so far as the form of the policy is concerned.

1 As to the degree of care demanded of particular classes of bailee, and the onus of proof in the case of loss or damage to the subject matter of the bailment, see BAILMENT. As to the liability of common carriers and innkeepers for the safety of property see CARRIAGE AND CARRIERS vol 7 (2008) PARA 16 et seq; LICENSING AND GAMBLING vol 67 (2008) PARA 197 et seq.

2 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583-584, CA, per Mellish LJ; *Castellain v Preston* (1883) 11 QBD 380 at 398, CA, per Bowen LJ.

3 *Maurice v Goldsbrough Mort & Co* [1939] AC 452 at 461, [1939] 3 All ER 63 at 68, PC.

4 As to contribution see PARAS 210-211 ante.

5 *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569, CA.

6 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; and see PARA 700 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/700. Basis of bailee's policy.

700. Basis of bailee's policy.

The usual form of insurance for a bailee, whatever the nature of the bailment, takes the form of indicating: (1) the perils against which the insurance is to be operative, such as fire¹, burglary, theft² or mere loss³; (2) the business carried on by the insured⁴ in connection with which the loss must have occurred; and (3) the goods in respect of which the policy is to be effective. An insurance simply on 'goods' will cover the interest of the insured as a bailee⁵; but the goods covered are usually described by terms such as 'goods in trust'⁶, 'goods on commission'⁷ or 'goods in transit'⁸, which are coupled frequently with the qualification 'for which the insured is responsible'⁹.

1 As to the perils covered by fire insurance see PARA 591 ante.

2 As to the perils covered by burglary and theft insurance see PARAS 644-647 ante.

3 As to what constitutes a loss see PARAS 658-659 ante.

4 As to the effect of a limitation by reference to the insured's business see PARA 664 ante.

5 *London and North Western Ry Co v Glyn* (1859) 1 E & E 652 at 664 per Crompton J; see also PARA 617 ante.

6 As to goods in trust see PARA 701 post.

7 As to goods on commission see PARA 702 post.

8 As to goods in transit see *Crows Transport Ltd v Phoenix Assurance Co Ltd* [1965] 1 All ER 596, [1965] 1 WLR 383, CA, followed in *Eurodale Manufacturing Ltd (t/a Connex Cellular Communications) v Ecclesiastical Insurance Office plc* [2003] EWCA Civ 203, [2003] All ER (D) 106 (Feb); and PARA 705 post.

9 As to goods for which the insured is responsible see PARA 703 post.

UPDATE

700 Basis of bailee's policy

NOTE 8--*Eurodale*, cited, reported at [2003] Lloyd's Rep IR 444.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/701. Goods in trust.

701. Goods in trust.

The term 'goods in trust' is not used in any technical sense as indicating that the bailee becomes in equity a trustee of the goods¹, although he will be a trustee for the owner of the goods of any money received under the insurance policy over and above his interest². The words are used in the ordinary commercial sense to indicate goods entrusted to the bailee³, so that goods left with a seller by a buyer after the property has passed are covered⁴. Similarly, where carriers who had undertaken to carry goods for the owner as and when transport became available handed a collection order to a person pretending to be a driver employed by one of the carriers' sub-contractors, thus enabling that person to obtain delivery of a consignment of goods and steal them, the goods were held to have been entrusted to the carriers, and even though the fraudulent driver had no valid authority, as between himself and the carriers, to receive the goods, the act of giving him the collection order for presentation to the owner operated as an offer by the carriers to carry that consignment⁵. Where, however, there is no obligation to return the goods, as where a farmer sends corn to a miller with an option to receive either an equal quantity of corn of the same type and quality or the value in cash of the corn sent, the essence of the transaction is a sale and not an entrusting at all⁶.

1 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870 at 880 per Lord Campbell CJ.

2 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870 at 881 per Lord Campbell CJ.

3 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870; *London and North Western Ry Co v Glyn* (1859) 1 E & E 652.

4 *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25 at 30 per Keating J.

5 *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 QB 468, [1956] 3 All ER 1, CA; *Crows Transport Ltd v Phoenix Assurance Co Ltd* [1965] 1 All ER 596, [1965] 1 WLR 383, CA.

6 *South Australian Insurance Co v Randell* (1869) LR 3 PC 101; cf *Genn v Winkel* (1912) 107 LT 434, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/702. Goods on commission.

702. Goods on commission.

The term 'goods on commission' is normally used to indicate goods entrusted to the bailee for some specific purpose, such as doing some specified work on them, or, more usually, holding them as agent for the purpose of earning a commission by selling them¹. This does not, however, mean that the commission as such is recoverable; any commission expected to be earned is a profit, and loss of profit must always be specifically insured². If goods are insured as goods held in trust or on commission, the value of the goods is normally recoverable in the event of their loss or destruction by a peril covered by the insurance³, but anything over and above the bailee's accrued costs, charges and expenses must be handed over to the owners⁴.

1 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870 at 879 per Lord Campbell CJ; *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25.

2 *Maurice v Goldsbrough Mort & Co Ltd* [1939] AC 452, [1939] 3 All ER 63, PC; *Lucena v Craufurd* (1806) 2 Bos & PNR 269; *Mackenzie v Whitworth* (1875) 1 Ex D 36 at 43; *Stockdale v Dunlop* (1840) 6 M & W 224 at 232 per Parke B. As to insurance in respect of loss of profits see PARA 801 post.

3 See the cases cited in PARA 698 note 2 ante.

4 *Maurice v Goldsbrough Mort & Co Ltd* [1939] AC 452, [1939] 3 All ER 63, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/703. Goods for which the insured is responsible.

703. Goods for which the insured is responsible.

To the general phrase 'goods in trust or on commission' there is frequently added the additional phrase 'for which the insured is responsible'. These words were derived from a suggestion¹ that if insurers wished to limit their responsibility to the responsibility of the insured they must use express words to that effect². The words then came to be used and were held to achieve the desired result³. Where a seller holds goods after the property and the risk have passed, the goods cease to be goods for which he is responsible⁴; plainly the intention in such a case is that the buyer should effect any necessary insurance. Similarly, where a bailee is only liable for negligence and goods are lost or destroyed without any negligence on his part, there is no legal liability of the kind envisaged by these added words⁵. The addition of these words therefore has the effect of making the policy not so much an insurance on an interest but a liability insurance. The position is made quite plain if the policy indicates that the subject matter of the insurance is the legal liability of the bailee, not loss of or damage to goods⁶.

1 See *London and North Western Ry Co v Glyn* (1859) 1 E & E 652 at 663 per Erle J, and at 665 per Hill J.

2 For the principle that in the absence of such a limitation the insured is entitled to recover the full value of the goods see PARA 699 ante.

3 *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25.

4 *North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25.

5 *Engel v Lancashire and General Assurance Co Ltd* (1925) 41 TLR 408.

6 See the form in *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 QB 468, [1956] 3 All ER 1, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/704. Floating policies.

704. Floating policies.

A bailee such as a warehouseman¹ may have goods constantly coming into and going out of his possession, and it is hardly practicable to effect a new insurance each time a parcel of goods comes in and to cancel it when the goods are removed. In such cases, therefore, it is common to have a floating policy covering all goods in the bailee's possession at the time of loss, usually with a named figure as the maximum covered². Another variation is a 'declaration' policy under which the insured merely has to declare from time to time the goods on risk³. The widest form of policy is an 'open' policy covering all risks by sea, land and air, where the obligation is to declare goods as soon as the insured learns they are at his risk, which may be no sooner than he learns of their loss⁴.

1 For the meaning of 'warehouse' see *Leo Rapp Ltd v McClure* [1955] 1 Lloyd's Rep 292. For the meaning of 'goods in store' see *Wulfson v Switzerland General Insurance Co Ltd* [1940] 3 All ER 221.

2 See *Crowley v Cohen* (1832) 3 B & Ad 478; *Joyce v Kennard* (1871) LR 7 QB 78; *Ewing & Co v Sicklemore* (1918) 35 TLR 55, CA.

3 See eg *Rivaz v Gerussi* (1880) 6 QBD 222.

4 *Davies v National Fire and Marine Insurance Co of New Zealand* [1891] AC 485, PC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/8. LIABILITY INSURANCE/(5) BAILEE'S INSURANCE/705. Insurance of goods by carrier.

705. Insurance of goods by carrier.

A carrier's potential liability to the owner is a peril against which insurance is normally required, and is the foundation of his having an insurable interest up to the full value of the goods¹. The goods covered are usually described by a term such as 'goods in trust'².

Ordinary burglary insurance covers property stolen from particular premises only³, but property may be covered in transit. In such a case the loss must be sustained in the course of the transit described in the policy⁴. Goods delivered to the carrier and stolen while awaiting loading are lost in the course of transit⁵, and a mere delivery at the place of destination is not necessarily a termination of the transit, for the transit continues until the goods come into the possession of the consignee⁶. Where, under the terms of the policy, transit is to include loading and unloading, the goods remain on risk until the completion of the unloading⁷.

Goods cease to be in transit when they are on a journey which is not in reasonable furtherance of their carriage to their ultimate destination⁸. The policy may contain a warranty that is not to apply if the vehicle carrying the goods is left 'unattended'⁹.

1 See *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 ChD 569 at 583-584, CA, per Mellish LJ; and PARA 698 ante.

2 As to goods in trust see PARA 701 ante.

3 As to the limitation of risk by reference to locality in burglary insurance see PARA 650 ante.

4 *Richardson v Roylance* (1933) 50 TLR 99; *London Tobacco Co (Overseas) Ltd v DFDS Transport Ltd* [1993] 2 Lloyd's Rep 306. As to transit clauses in marine insurance see PARAS 306-310 ante.

5 *Crows Transport Ltd v Phoenix Assurance Co Ltd* [1965] 1 All ER 596, [1965] 1 WLR 383, CA; *Eurodale Manufacturing Ltd (t/a Connekt Cellular Communications) v Ecclesiastical Insurance Office plc* [2003] EWCA Civ 203, [2003] All ER (D) 106 (Feb).

6 See *Heinekey v Earle* (1857) 8 E & B 410 at 423 per Lord Campbell CJ.

7 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL.

8 *S C A (Freight) Ltd v Gibson* [1974] 2 Lloyd's Rep 533.

9 See eg *Plaistow Transport Ltd v Graham* [1966] 1 Lloyd's Rep 639; *Ingleton of Ilford Ltd v General Accident, Fire and Life Assurance Corpn Ltd* [1967] 2 Lloyd's Rep 179; *J Lowenstein & Co Ltd v Poplar Motor Transport (Lymm) Ltd (Gooda, third party)* [1968] 2 Lloyd's Rep 233; *A Cohen & Co Ltd v Plaistow Transport Ltd (Graham, third party)* [1968] 2 Lloyd's Rep 587.

UPDATE

705 Insurance of goods by carrier

NOTE 5--*Eurodale*, cited, reported at [2003] Lloyd's Rep IR 444.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/706. Composite nature of insurance.

9. MOTOR VEHICLE INSURANCE

(1) NATURE AND SCOPE OF INSURANCE

706. Composite nature of insurance.

In any of its various forms a motor insurance policy is a composite insurance unless it is limited to the risks which are compulsorily insurable by statute¹. It always starts by reference to a particular car², whether it is a specified car or a car of a specified class, or one of a fleet of cars which may be individually declared, if so required, from time to time, and is normally limited in essence to use of this car. It may, therefore, contain either the bare minimum cover without which a car cannot lawfully be used on a road at all³ or any one or more of a number of variations in addition. Therefore, the scope of the insurance falls to be considered under the various types of insurance which a normal policy may contain.

1 As to the risks compulsorily insurable by statute see PARAS 733-737 post.

2 See *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 48 TLR 17, HL; *Tattersall v Drysdale* [1935] 2 KB 174. The ownership of the specified vehicle is the foundation of the insurable interest without which the policy is unenforceable even under an extension clause covering the insured while driving another vehicle: *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 at 290.

3 See PARA 707 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/707. Types of insurance afforded.

707. Types of insurance afforded.

Between the bare minimum of insurance required by statute and the most comprehensive insurance which may be obtained under a motor policy, there is a wide difference, both in the scope of cover afforded and in the premium which is required. The main heads of insurance may be summarised as follows:

- 173 (1) A Road Traffic Act policy is one which contains the bare minimum requirements of cover if a car is to be legally usable on a public road at all, namely cover against legal liability to third parties in respect of bodily injury or death or damage to property within the limited categories laid down by the Road Traffic Act 1988¹.
- 174 (2) A third party liability policy may provide cover against legal liability for bodily injury to or death of any third party, even if he is not within the limited categories laid down by the Road Traffic Act 1988, for example where liability to employees carried pursuant to a contract of employment is covered².
- 175 (3) Third party liability cover (limited or general) may be coupled with an insurance on the vehicle itself (including accessories) against fire and theft.
- 176 (4) Third party liability cover (limited or general) may be coupled with an insurance on the vehicle, not merely against fire and theft but also against loss or damage however caused³. Where unlimited third party cover is afforded, together with full cover of the vehicle against any sort of loss or damage, the policy is usually described as 'fully comprehensive'.
- 177 (5) A clause may contain provision for loss of profits during loss of use of a profit-earning vehicle (such as a bus or lorry) which is destroyed or damaged and cannot be replaced or repaired without an interval during which the profits it would have earned are lost⁴.
- 178 (6) A clause may contain a degree of personal accident insurance by affording compensation for injuries or death sustained by the insured himself by reason of his use of the car⁵.
- 179 (7) A common extension clause is the 'permitted driver clause' by which cover against third party liability (limited or general) is afforded to any person driving the insured car with the permission of the insured⁶.
- 180 (8) Another common extension clause affords cover to the insured, within the scope of the policy, while driving any other vehicle⁷.

1 As to the minimum statutory requirements see PARAS 733-737 post.

2 As to liability insurance see generally para 660 et seq ante.

3 As to property insurance see generally para 591 et seq ante.

4 As to insurance against loss of profits see generally para 801 post.

5 As to personal accident insurance see generally para 567 et seq ante.

6 As to the permitted driver clause see PARAS 720-722 post.

7 See PARA 723 post.

UPDATE

707-708 Types of insurance afforded, Indemnity as basis of contract

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/708. Indemnity as basis of contract.

708. Indemnity as basis of contract.

A contract of motor insurance is mainly a contract of indemnity¹. This means that, so far as concerns the insurance of the car as an example of property insurance or the insurance of third party liability (whether limited or general) as an example of public liability insurance, the ordinary principles of these classes of insurance are applicable². However, in so far as clauses provide for insurance cover not in the nature of an indemnity, as where provision is made for the death or disablement of the insured himself, the principles of life insurance or personal accident insurance will apply³.

1 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014, CA, per Fletcher Moulton LJ; *Weld-Blundell v Stephens* [1919] 1 KB 520 at 529, CA, per Bankes LJ (affd [1920] AC 956, HL).

2 As to property insurance see generally para 591 et seq ante. As to public liability insurance see generally paras 690-691 ante. Notwithstanding anything in any enactment, a person issuing a policy of insurance under the Road Traffic Act 1988 s 145 (as amended) (see PARAS 731, 733-735 post), is liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons: s 148(7); see PARA 738 post. 'Policy of insurance' includes a covering note: s 161(1).

3 As to life insurance see generally para 525 et seq ante. As to personal accident insurance see generally para 567 et seq ante. For the principle that contracts of life insurance and personal accident insurance are not contracts of indemnity see PARA 4 ante.

UPDATE

707-708 Types of insurance afforded, Indemnity as basis of contract

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/709. Nature of public liability risk.

709. Nature of public liability risk.

Legal liability arising out of the use of a car on a highway is usually founded on negligence¹, either in the management and control of the car on the road or in its maintenance and upkeep as a vehicle intended to be used on the road². Technically, a claim may be founded on nuisance, but there is seldom any practicable advantage to be derived from such a plea; the presence of a motor vehicle on the highway, even as an obstruction owing to a breakdown, will only be regarded as a nuisance if the obstruction continues for an unreasonable time or in unreasonable circumstances³.

1 *Tinline v White Cross Insurance Association* [1921] 3 KB 327 at 331 per Bailhache J. Where the personal injury to a victim of a road accident is inflicted unintentionally, his only cause of action at the present day lies in negligence and not in trespass: *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA.

2 Conditions requiring the insured to take reasonable care to maintain the car in efficient condition are not unusual and their validity has been upheld: see PARA 714 post.

3 *Maitland v R T and J Raisbeck and Hewitt Ltd* [1944] KB 689, [1944] 2 All ER 272, CA; distinguishing and explaining *Ware v Garston Haulage Co Ltd* [1944] 1 KB 30, [1943] 2 All ER 558, CA; cf *Hill-Venning v Beszant* [1950] 2 All ER 1151, CA; and see generally NUISANCE.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/710. Causation as the basis of public liability risk.

710. Causation as the basis of public liability risk.

Under a policy couched in the language normally used it is not necessary for the car itself to be directly involved in an accident involving injury to the person or property of a third party. It is usually sufficient if negligence in the control, management or maintenance of the car is a cause of the damage claimed¹. It is, of course, essential that the injury or damage caused falls within the terms of the cover afforded by the policy².

¹ *Captain Boyton's World's Water Show Syndicate Ltd v Employers' Liability Assurance Corp'n Ltd* (1895) 11 TLR 384, CA.

² *Tinline v White Cross Insurance Association* [1921] 3 KB 327 at 332 per Bailhache J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(1) NATURE AND SCOPE OF INSURANCE/711. Negligence and public policy.

711. Negligence and public policy.

A motor policy is not void as being contrary to public policy because it purports to cover the driver against the consequences of his own negligence; indeed, as evidenced by the relevant legislation, public policy seems to demand that compensation should be available to the victims of the negligent use of motor vehicles¹. Accordingly, the indemnity under the policy is valid and enforceable whether the result of the negligence is bodily injury² or death³, whether the negligence established is that of an employee⁴ or of the insured himself⁵, and even though the negligence, where it results in the death of a third party, is so gross as to amount to manslaughter⁶. However, where injury to a third party is caused by a deliberately calculated act, the insured cannot obtain indemnity from his insurers⁷. The mere fact that a vehicle is being used illegally does not invalidate an insurance policy taken out in relation to the vehicle in so far as the policy insures the owner of the vehicle against the consequences of the vehicle being negligently driven as distinct from the consequences of illegal use⁸.

1 As to compulsory motor vehicle insurance see PARA 729 et seq post.

2 See *Tinline v White Cross Insurance Association* [1921] 3 KB 327.

3 See *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311.

4 *A-G v Adelaide Steamship Co Ltd* [1923] AC 292 at 308, HL, per Lord Wrenbury.

5 *Tinline v White Cross Insurance Association* [1921] 3 KB 327.

6 *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311. The doubts felt about these decisions (see *Haseldine v Hosken* [1933] 1 KB 822 at 833, CA, per Scrutton LJ, and at 838 per Greer LJ) can no longer be entertained except in so far as the decision in question might tend to suggest that an insured can get indemnity against his own intentional act of illegality: see *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29 at 39, [1953] 1 All ER 651 at 659, CA, per Denning LJ, and at 44 and 662 per Hodson LJ.

7 *Tinline v White Cross Insurance Association* [1921] 3 KB 327 at 333 per Bailhache J; *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29 at 44, [1953] 1 All ER 651 at 662, CA, per Hodson LJ; *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769; see also *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 595, [1938] 2 All ER 602 at 604, HL, per Lord Atkin; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA.

8 *Leggate v Brown* [1950] 2 All ER 564, DC. As to the effect of user not permitted by the policy see PARA 712 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(2) STIPULATIONS DEFINING THE RISK/712. Definition of risk by reference to use.

(2) STIPULATIONS DEFINING THE RISK

712. Definition of risk by reference to use.

A motor policy usually contains, either in express terms or by incorporation of the proposal¹, a statement or description of the purposes for which the vehicle may be used. Such a statement or description has the effect of defining the risk, so that the insurers are liable only in respect of accidents occurring while the vehicle is being used for a stipulated purpose². Therefore, if the vehicle is used for a different purpose, there is a different risk which is uninsured, and, if the accident happens while the vehicle is being so used, the insured is not entitled to recover³. However, in the absence of a clear provision to that effect, the use of the vehicle for an unpermitted purpose does not give the insurers a right to avoid the policy altogether for all time and for all purposes; the result is merely to suspend the operation of the policy for the duration of the unpermitted use⁴. As soon, therefore, as the unpermitted use ceases and use for a permitted purpose is resumed, the policy again attaches, and the insured is not precluded from recovering in respect of an accident which occurs during a permitted use merely because, at some earlier time, he had put himself outside the scope of his insurance⁵.

1 As to the incorporation of the proposal see PARA 62 ante.

2 *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA; *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL; *Dunthorne v Bentley* [1996] RTR 428, [1999] Lloyd's Rep IR 560, CA.

3 *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA; *Murray v Scottish Automobile and General Insurance Co Ltd* 1929 SC 49; cf *Stuart v Horse Insurance Co* (1893) 1 SLT 91.

4 As to a change in the circumstances comprised in the definition of the risk see PARA 125 ante.

5 *Farr v Motor Traders' Mutual Insurance Society* [1920] 3 KB 669, CA; *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(2) STIPULATIONS DEFINING THE RISK/713. Prohibition by reference to type of use.

713. Prohibition by reference to type of use.

A motor policy often contains a clause expressly excluding use of the vehicle for certain purposes. This is not necessary if there is an adequate statement or description of what is included, but it is not unusual to find both a description of what is included and a clause expressly excluding use for particular purposes. Thus, use for business purposes may be prohibited, either partially¹ or entirely², or certain types of business, such as the motor trade³, may be specifically excluded. Again, use for hire or reward is commonly excluded⁴, as also is racing or pace-making⁵.

1 *Pailor v Co-operative Insurance Society* (1930) 38 Ll L Rep 237, CA (use for insured's business not extended to permitted driver); *Passmore v Vulcan Boiler and General Insurance Co Ltd* (1935) 52 TLR 193 (use in insured's business covered, but not if coupled with some other person's business); *Jones v Welsh Insurance Corp'n Ltd* [1937] 4 All ER 149 (use for only one business permitted); *D H R Moody (Chemists) Ltd v Iron Trades Mutual Insurance Co Ltd* [1971] 1 Lloyd's Rep 386 (use in insured's business only covered).

2 *Piddington v Co-operative Insurance Society Ltd* [1934] 2 KB 236.

3 *Gray v Blackmore* [1934] 1 KB 95; *Browning v Phoenix Assurance Co Ltd* [1960] 2 Lloyd's Rep 360.

4 *Wyatt v Guildhall Insurance Co Ltd* [1937] 1 KB 653, [1937] 1 All ER 792; *Bonham v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 292, [1945] 1 All ER 427, CA; *Orr v Trafalgar Insurance Co Ltd* (1948) 82 Ll L Rep 1, CA. Cf *McCarthy v British Oak Insurance Co Ltd* [1938] 3 All ER 1; *East Midland Traffic Area Traffic Comrs v Tyler* [1938] 3 All ER 39, DC.

5 For the meaning of 'racing' see *Alliance Aeroplane Co Ltd v Union Insurance Society of Canton Ltd* (1920) 5 Ll L Rep 341, 406 (a case relating to an aircraft).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(2) STIPULATIONS DEFINING THE RISK/714. Prohibition by reference to state of vehicle.

714. Prohibition by reference to state of vehicle.

A motor policy often contains a prohibition against using the vehicle at all in a particular condition. Thus, it is usually provided that the vehicle is not to be used in a damaged or unsafe condition¹. If the language is clear and unambiguous, the prohibition will apply even if the insured did not know of the unsafe condition², nor will it be limited to the condition of the car at the commencement of the journey³. Similarly, there may be prohibitions against towing another vehicle⁴ or a trailer⁵, against using a motor cycle without a sidecar attached⁶ or carrying a passenger without a sidecar⁷. Again, there may be a prohibition against carrying a load in excess of that for which the vehicle is constructed⁸ but, if so worded, the prohibition only applies where there is a specific weight which must not be exceeded⁹; it does not cover a case of an excessive number of passengers¹⁰. Sometimes there is a prohibition against carrying goods¹¹ or passengers¹² or precluding recovery if the vehicle is stolen while the keys have been left inside the vehicle¹³. All these prohibitions operate as a further description or definition of the risk¹⁴.

¹ See *Jenkins v Deane* (1933) 103 LJKB 250 (tow chain not part of insured vehicle); see also *Jones and James v Provincial Insurance Co* (1929) 46 TLR 71 (condition requiring insured to take all reasonable steps to maintain vehicle in efficient condition; condition broken by removal of foot-brake, leaving only hand-brake); *Brown v Zurich General Accident and Liability Insurance Co Ltd* [1954] 2 Lloyd's Rep 243 (similar condition; smooth front tyres a breach of the condition); *M'Innes v National Motor and Accident Insurance Union Ltd* [1963] 2 Lloyd's Rep 415; *Conn v Westminster Motor Insurance Association Ltd* [1966] 1 Lloyd's Rep 407, CA (similar condition again; condition broken by worn tyres, although state of tyres not cause of accident); *Clarke v National Insurance and Guarantee Corp'n Ltd* [1964] 1 QB 199, [1963] 3 All ER 375, CA (prohibition against using four-seater car in unsafe or unroadworthy condition; prohibition applied because car carrying nine at time of accident); *A P Salmon Contractors Ltd v Monksfield* [1970] 1 Lloyd's Rep 387; *New India Assurance Co Ltd v Yeo Beng Chow (alias Yeo Beng Chong)* [1972] 3 All ER 293, [1972] 1 WLR 786, PC (condition in policy requiring insured to safeguard vehicle from loss and damage and maintain it in efficient condition still applicable after deletion of loss and damage section).

² *Trickett v Queensland Insurance Co* [1936] AC 159, PC.

³ *Trickett v Queensland Insurance Co* [1936] AC 159, PC. The correlation of roadworthiness in a car to seaworthiness in a ship, which found favour in *Barrett v London General Insurance Co* [1935] 1 KB 238, was disapproved in *Trickett v Queensland Insurance Co* supra, but was found to be useful in *Clarke v National Insurance and Guarantee Corp'n Ltd* [1964] 1 QB 199, [1963] 3 All ER 375, CA.

⁴ *Gray v Blackmore* [1934] 1 KB 95.

⁵ *Jenkins v Deane* (1933) 103 LJKB 250.

⁶ *Carnill v Rowland* [1953] 1 All ER 486, [1953] 1 WLR 380, DC.

⁷ *Bright v Ashfold* [1932] 2 KB 153.

⁸ *Jenkins v Deane* (1933) 103 LJKB 250.

⁹ *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA.

¹⁰ *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA.

¹¹ *Piddington v Co-operative Insurance Society Ltd* [1934] 2 KB 236; *Jones v Welsh Insurance Corp'n Ltd* [1937] 4 All ER 149.

¹² *Roberts v Anglo-Saxon Insurance Association* (1927) 137 LT 243, CA.

13 *Hayward v Norwich Union Insurance Ltd* [2001] EWCA Civ 243, [2001] 1 All ER (Comm) 545, [2001] Lloyd's Rep IR 410.

14 *Bright v Ashfold* [1932] 2 KB 153; *Piddington v Co-operative Insurance Society Ltd* [1934] 2 KB 236; *Carnill v Rowland* [1953] 1 All ER 486, [1953] 1 WLR 380, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(2) STIPULATIONS DEFINING THE RISK/715. Prohibition by reference to area.

715. Prohibition by reference to area.

It is common to find in a motor policy a limitation of the area within which a vehicle may be used¹. Normally the cover will only extend to the United Kingdom unless a 'foreign use' clause is specially added, but there may be limitations even within the United Kingdom². A similar result is achieved where there is a stipulation as to where the vehicle is to be garaged³. Removal of the car from the prescribed garage or use of it outside the prescribed area does not, however, invalidate the policy altogether unless there are clear words producing this result; if the car subsequently returns to the proper garage or is used in the proper area, the policy re-attaches and recovery is, therefore, allowed in respect of an accident after it has re-attached⁴. A condition as to area only applies in relation to the use of the insured car. If a claim arises under the personal accident section of the policy and is unrelated to the use of the insured car, it will be valid even if the accident occurs abroad unless there is an appropriate limitation in the personal accident section also⁵.

1 See eg *Verelst's Administratrix v Motor Union Insurance Co Ltd* [1925] 2 KB 137.

2 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL; *Palmer v Cornhill Insurance Co Ltd* (1935) 52 Ll L Rep 78 (lorry restricted to use in Mepal, Cambridgeshire). The removal of the engine to another place is not a breach of such a stipulation if the rest of the car remains in the prescribed place: *Seaton v London General Insurance Co Ltd* (1932) 48 TLR 574. For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

3 *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

4 *Bonney v Cornhill Insurance Co* (1931) 40 Ll L Rep 39; cf *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

5 *Verelst's Administratrix v Motor Union Insurance Co Ltd* [1925] 2 KB 137.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(2) STIPULATIONS DEFINING THE RISK/716. Prohibition by reference to the driver.

716. Prohibition by reference to the driver.

There is often a provision limiting the driving of the vehicle to the insured himself¹. If so, he cannot, even in an emergency, allow someone else to drive without putting his insurers off risk². Frequently there is an extension clause authorising the driving of the vehicle on the insured's order or with his permission, either by a limited class of people or generally³. However, usually there is a provision, whether it is an 'own driver' policy or a policy with a permitted driver clause, to the effect that the driver holds, or has held and is not disqualified from holding, a driving licence⁴. For the purpose of such a provision, a person is disqualified if he has been disqualified by order of a court⁵ or is not by law qualified by reason of age to hold a licence⁶. The mere fact, however, that a person is refused a licence (or has had his licence revoked) on grounds of health does not mean that he is disqualified⁷.

1 A lower rate of premium is charged if the car is not to be driven by any person other than the insured.

2 *Herbert v Railway Passengers Assurance Co Ltd* [1938] 1 All ER 650; *G F P Units Ltd v Monksfield* [1972] 2 Lloyd's Rep 79.

3 As to the effect of the 'permitted driver clause' see PARAS 720-722 post.

4 See *Spraggon v Dominion Insurance Co Ltd* (1941) 69 Ll L Rep 1, CA; *Lester Bros (Coal Merchants) Ltd v Avon Insurance Co Ltd* (1942) 72 Ll L Rep 109; *Haworth v Dawson* (1946) 80 Ll L Rep 19.

5 *Taylor v Kenyon* [1952] 2 All ER 726, DC; cf *Edwards v Griffiths* [1953] 2 All ER 874, [1953] 1 WLR 1199, DC.

6 *Mumford v Hardy* [1956] 1 All ER 337, [1956] 1 WLR 163, DC. The holding of a provisional licence is sufficient even though the holder is unaccompanied while driving the vehicle: *Rendlesham v Dunne (Pennine Insurance Co Ltd, third party)* [1964] 1 Lloyd's Rep 192.

7 *Edwards v Griffiths* [1953] 2 All ER 874, [1953] 1 WLR 1199, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/717. Different forms of cover for different road users.

(3) STANDARD FORMS OF COVER

717. Different forms of cover for different road users.

The uses to which motor vehicles are put necessarily vary widely. Public service vehicles are designed to carry a large number of passengers at a time, and obviously the insurance required must be such as to cover the operator not only against the risk of injury to pedestrians and other road users but also against the risk of injury to his passengers. Special considerations also apply in the case of goods vehicles, from light vans for local delivery up to heavy long distance lorries, possibly with trailers. In both these cases the insurance may be in a special form, either a commercial transport insurance or a carrier's insurance. Most vehicles on the road, however, are private cars, and a number of provisions have become standardised for them¹.

1 As to the standard provisions see PARAS 718-723 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/718. Social, domestic and pleasure purposes.

718. Social, domestic and pleasure purposes.

The basis of most insurance policies for private cars is defined by the phrase 'use for social, domestic and pleasure purposes'. Each of the epithets is a simple English word, but it is by no means easy to describe the precise ambit of any one of them. However, it is not difficult to recognise the sort of case which is inside or outside the phrase. Thus, if a car is used for a journey of which the object is to negotiate a business deal, the use is not for social or domestic or pleasure purposes merely because it is a more comfortable or convenient or restful method of making the journey than any other method¹.

¹ *Wood v General Accident Fire and Life Assurance Corp'n* (1948) 65 TLR 53; see also *Orr v Trafalgar Insurance Co Ltd* (1948) 82 Ll L Rep 1, CA; *Lee v Poole* [1954] Crim LR 942, DC; *D H R Moody (Chemists) Ltd v Iron Trades Mutual Insurance Co Ltd* [1971] 1 Lloyd's Rep 386 (local authority used car to see off visiting delegation at airport; held to be 'social use'); *Seddon v Binions (Zurich Insurance Co Ltd, third party)* [1978] 1 Lloyd's Rep 381, [1978] RTR 163, CA. Cf *Killick v Rendall* [2000] 2 All ER (Comm) 57, [2000] Lloyd's Rep IR 581, CA (not motor insurance) where in respect of one of the insured the journey was partly for business and partly for pleasure; and PARA 579 text and note 7 ante.

UPDATE

718 Social, domestic and pleasure purposes

NOTE 1--*Seddon*, cited, applied: *Keeley v Pashen* [2004] EWCA Civ 1491, [2005] 1 WLR 1226.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/719. Use in connection with the insured's business.

719. Use in connection with the insured's business.

In addition to social, domestic and pleasure purposes there is usually cover for use in connection with the insured's business, which may be further identified by specific definition¹. This phrase operates to circumscribe the insurance not only by reference to the particular business which is stipulated or described in the policy², but also by reference to its being the insured's business. If, therefore, the insured sells his business to a company³, or uses the car jointly with another employee of the same employer for the employer's business⁴, the policy will not apply; nor will use for the business of the employer of a permitted driver be covered if the use is limited to use for the insured's business⁵. If the stipulated use is for agricultural purposes, this does not cover moving household effects for a farm worker⁶ or, it seems, the taking of a show pony to a show⁷.

1 *Jones v Welsh Insurance Corpn Ltd* [1937] 4 All ER 149.

2 *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL; see also *Killick v Rendall* [2000] 2 All ER (Comm) 57, [2000] Lloyd's Rep IR 581, CA (life insurance where cover was limited to the insured's business travel). Where a policy excludes use for hire or reward other than private hire, 'private hire' means hire for a defined journey at a defined time as distinct from plying for hire: *Lyons v Denscombe* [1949] 1 All ER 977, DC.

3 *Levinger v Licenses and General Insurance Co Ltd* (1936) 54 Ll L Rep 68.

4 *Passmore v Vulcan Boiler and General Insurance Co Ltd* (1935) 52 TLR 193.

5 *Pailor v Co-operative Insurance Society Ltd* (1930) 38 Ll L Rep 237, CA.

6 *Agnew v Robertson* 1956 SLT (Sh Ct) 90.

7 *Henderson v Robson* (1949) 113 JP 313 (a decision as to the scope of the Finance Act 1943 s 8 (repealed), relating to excise duty).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/720. Scope of a permitted driver clause.

720. Scope of a permitted driver clause.

A motor policy often contains a provision extending the insurance cover, usually against third party risks only, to any person driving the insured car on the order or with the permission of the insured¹, the permitted driver being treated as though he were the insured. Such a provision is required if the insured is in the habit of causing or permitting² his car to be driven by another person because if the insured, in the absence of such a provision, causes or permits his car to be so driven, and the other person does not himself hold an insurance policy covering him while driving the car, the insured will not only be guilty of an offence³ but will also be responsible for injuries, within the scope of compulsory insurance, caused by the use of the car, the uninsured use being a breach of statutory duty by the insured who has caused or permitted it⁴. Sometimes the permitted driver is limited to someone who is a relative or friend of the insured⁵. However, the extension is often qualified by a provision that the permitted driver is not entitled to an indemnity under any other insurance policy⁶. There is also invariably a requirement that the permitted driver must hold⁷, or must have held and must not be disqualified from holding⁸, a driving licence⁹ and there may be an express exclusion of certain classes of persons from the category of permitted drivers¹⁰.

1 See eg *Smith v Ralph* [1963] 2 Lloyd's Rep 439, DC; *Kelly v Cornhill Insurance Co Ltd* [1964] 1 All ER 321, [1964] 1 WLR 158, HL (permission not terminated by death of insured). The language usually used derives from the Road Traffic Act 1988 s 156(a) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 956). It does not cover a purchaser who drives the car away after buying it from the insured: see *Peters v General Accident Fire and Life Assurance Corp Ltd* [1938] 2 All ER 267, CA (insured not entitled to assign policy to third party). A policy is voidable where the insured falsely represents that another's vehicle is his own property: *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246.

2 As to the meaning of 'cause or permit' (contained in the Road Traffic Act 1988 s 143(1)(b) (as amended)), see *Watkins v O'Shaughnessy* [1939] 1 All ER 385, CA; *Houston v Buchanan* [1940] 2 All ER 179 at 187, HL, per Lord Wright; *Goodbarne v Buck* [1940] 1 KB 771, [1940] 1 All ER 613, CA; *Lyons v May* [1948] 2 All ER 1062, DC; *Lloyd v Singleton* [1953] 1 QB 357, [1953] 1 All ER 291, DC; *Shave v Rosner* [1954] 2 QB 113, [1954] 2 All ER 280, DC; *James & Son Ltd v Smees* [1955] 1 QB 78, [1954] 3 All ER 273, DC.

3 See the Road Traffic Act 1988 s 143(1) (as amended), 143(2); and PARA 729 post.

4 Failure to perform the statutory duty to insure will involve a civil liability to a person injured by the uninsured vehicle: *Monk v Warbey* [1935] 1 KB 75, CA; and see *Richards v Port of Manchester Insurance Co Ltd* (1934) 152 LT 261 (affd 152 LT 413, CA); *Corfield v Groves* [1950] 1 All ER 488; cf *Daniels v Vaux* [1938] 2 KB 203, [1938] 2 All ER 271 (where the failure of the plaintiff to commence in due time an action against the negligent driver, and not the failure of the owner to insure, was the real cause of the plaintiff's loss). Compensation may be payable by the Motor Insurers' Bureau to persons who suffer damage or injury caused by a driver who is uninsured: para 758 post.

5 *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282. The driver need not be on terms of social equality in order to qualify as 'a friend': *Pailor v Co-operative Insurance Society Ltd* (1930) 38 Ll L Rep 237, CA.

6 *Gale v Motor Union Insurance Co* [1928] 1 KB 359; *Weddell v Road Transport and General Insurance Co Ltd* [1932] 2 KB 563; *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250, [1945] 1 All ER 316. If the permitted driver's personal insurance policy contains a similar provision, questions of contribution between the insurers will depend on whether one or other, or each, of the provisions is framed as a non-contribution clause or as a rateable contribution clause: see PARA 207 ante.

7 See *Mumford v Hardy* [1956] 1 All ER 337, [1956] 1 WLR 163, DC (licence obtained by false pretences by person under age; licence void by what is now the Road Traffic Act 1988 s 103(2) (as substituted); driver not covered, although insurers willing to admit liability); *Rendlesham v Dunne (Pennine Insurance Co Ltd, third party)* [1964] 1 Lloyd's Rep 192 (unaccompanied provisional licence holder covered). Cf para 732 note 2 post.

8 See *Edwards v Griffiths* [1953] 2 All ER 874, [1953] 1 WLR 1199, DC ('disqualified' means disqualified by order of court; driver who had been refused renewal of licence on ground of health was not disqualified); cf *Taylor v Kenyon* [1952] 2 All ER 726, DC.

9 See *John T Ellis Ltd v Hinds* [1947] KB 475, [1947] 1 All ER 337, DC (insurers' liability excluded while vehicle driven by person who, to the insured's knowledge, did not hold a licence; knowledge must be actual and not merely constructive); *Lester Bros (Coal Merchants) Ltd v Avon Insurance Co* (1942) 72 Ll L Rep 109 (insurer not liable if vehicle driven either by insured when insured did not hold licence or by any person with insured's consent when that person, to insured's knowledge, did not hold licence; insured a limited company, and therefore incapable of driving except by agency of employees; vehicle driven by insured's employee held to be driven by insured, and not by a person with insured's consent within meaning of policy; insurers therefore not liable even though insured ignorant that employee did not hold licence).

10 For a list of exclusions see eg *Richards v Port of Manchester Insurance Co Ltd* (1934) 152 LT 261; affd 152 LT 415, CA.

UPDATE

720-723 Scope of a permitted driver clause ... Cover for the insured driving other cars

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

720 Scope of a permitted driver clause

NOTE 4--*Monk*, cited, distinguished: *Bretton v Hancock* [2005] EWCA Civ 404, [2005] Lloyd's Rep IR 454.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/721. Permitted drivers' rights under the policy.

721. Permitted drivers' rights under the policy.

A permitted driver is not directly a party to the original contract of insurance, and on ordinary common law principles of contract law he cannot have any right to proceed against the insurers on the policy unless it is possible to show that the insured, when making the contract, intended to act as agent or trustee of the permitted driver¹. Frequently this is not possible because the particular permitted driver was not, at that time, in contemplation at all. It is, however, laid down by statute that if insurers issue a motor policy covering compulsorily insurable risks, they are liable to indemnify any persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons². The permitted driver, accordingly, has a direct right of action within the ambit of this provision against the insurers³. In effect he becomes a party to the contract of insurance⁴, but he must take the contract as he finds it; he cannot excuse a breach of a condition by pleading that he was unaware of its terms or existence⁵.

1 *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; cf *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282, where enforcement by the insured on behalf of the permitted driver was allowed. It may be possible to establish a right of action under the Contracts (Rights of Third Parties) Act 1999 (see PARA 6 ante) but this is not necessary in view of the statutory rights referred to in the text and note 2 infra.

2 Road Traffic Act 1988 s 148(7): see PARAS 708 note 2 ante, 738 post.

3 *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250, [1945] 1 All ER 316, CA. The requirement of the Life Assurance Act 1774 s 2 (as amended) (see PARA 543 ante), as to the insertion of the names of all persons for whose use or benefit, or on whose account, the policy is made, does not apply as the policy is a policy on goods, ie the car: *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282.

4 *Sutch v Burns* (1943) as reported in 60 TLR 1 at 2 per Atkinson J (revsd on appeal [1944] KB 406, [1944] 1 All ER 520n, CA, on the ground that the policy in question did not indemnify the permitted driver in the circumstances); and see *John T Ellis Ltd v Hinds* [1947] KB 475 at 485-486, [1947] 1 All ER 337 at 339, DC.

5 *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246; *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250, [1945] 1 All ER 316, CA.

UPDATE

720-723 Scope of a permitted driver clause ... Cover for the insured driving other cars

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/722. Extent of cover afforded to a permitted driver.

722. Extent of cover afforded to a permitted driver.

The formula frequently adopted to provide cover for a permitted driver states that he is to be regarded, for the purpose of having the benefits conferred by the relevant sections of the policy, as though he were the insured. The result of such wording is that, if the relevant section of the policy covers legal liability to 'any person', even the insured will rank as a person whose injuries must be paid for, if they are caused by the negligence of the permitted driver. The insured's chauffeur can thus recover from the insurers an indemnity against damages recovered from him by the insured in respect of injuries caused to the insured by the chauffeur's negligence¹. The death of the insured does not necessarily destroy the cover afforded to a permitted driver². It cannot, however, be assumed that an employer's policy, even if the driving is going to be carried out by his employees, necessarily contains a permitted driver clause or that the employer will be liable for breach of the statutory duty to insure³ if there is no such provision covering the individual liability of each driver. The employer fulfils his statutory duty if he covers his own liabilities, even if the driving is vicariously performed; he does not, in addition, have to cover the personal liability of each driver⁴. The purpose for which the permitted driver uses the car must, in every case, be within the description of use clause as it falls to be interpreted in relation to him; if, for example, on the true construction of the policy, use for business is limited to the business of the insured, the permitted driver will not be covered if he uses the vehicle on the business of his own employer who is other than the insured⁵.

1 *Digby v General Accident Fire and Life Assurance Corp'n Ltd* [1943] AC 121, [1942] 2 All ER 319, HL.

2 *Kelly v Cornhill Insurance Co Ltd* [1964] 1 All ER 321, [1964] 1 WLR 158, HL.

3 As to the statutory duty see PARA 733 post.

4 *John T Ellis Ltd v Hinds* [1947] KB 475, [1947] 1 All ER 337, DC; *Lees v Motor Insurers' Bureau* [1952] 2 All ER 511; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL; see also *Marsh v Moores* [1949] 2 KB 208, [1949] 2 All ER 27, DC. It has been held that, in a contract of service between the owner of a vehicle and a person employed to drive it, there is an implied term that compulsory insurance cover is to be maintained by the owner: see *Gregory v Ford* [1951] 1 All ER 121. This is, however, limited to compulsory insurance, and does not in any case preclude an employer from recovering from a negligent employee damages which the employer has to pay solely by reason of the employee's negligence: see *Semtex Ltd v Gladstone* [1954] 2 All ER 206, [1954] 1 WLR 945; *Lister v Romford Ice and Cold Storage Co Ltd* supra (where there was held to be no implied term in the contract of service, either that the employee should be indemnified by his employer against claims in respect of acts done in the course of his employment, or that he should receive the benefit of any contract of insurance); see further EMPLOYMENT vol 39 (2009) PARA 39.

5 *Pailor v Co-operative Insurance Society Ltd* (1930) 38 Ll L Rep 237, CA. See further PARA 719 ante.

UPDATE

720-723 Scope of a permitted driver clause ... Cover for the insured driving other cars

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(3) STANDARD FORMS OF COVER/723. Cover for the insured driving other cars.

723. Cover for the insured driving other cars.

A motor policy frequently has an extension clause covering the insured while driving any other car¹. Such a clause may only be operative so long as the insured retains the insured car, because that is the basis of his insurable interest², or it may continue to operate even after he has disposed of it³. The effect of the clause will depend upon the construction of the individual policy⁴. Where the car is insured by a partnership, there is no change of ownership merely because a new partner joins the firm⁵. The purposes for which the other car may be used are, of course, normally correlated with the descriptions and prohibitions of use stipulated in relation to the insured car. The general principles of public liability insurance apply to such an extension clause⁶.

1 *Laurence v Davies (Norwich Union Fire Insurance Society Ltd, third party)* [1972] 2 Lloyd's Rep 231 (in the absence of any clearly expressed alternative meaning, the definition of 'motor car' is that now contained in the Road Traffic Act 1988 s 185(1); the insured was, therefore, covered while driving a van). For the application of such an extension clause see *Bullock v Bellamy* (1940) 67 Ll L Rep 392.

2 *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 48 TLR 17, HL; *Tattersall v Drysdale* [1935] 2 KB 174; *Peters v General Accident Fire and Life Assurance Corp Ltd* [1938] 2 All ER 267, CA; see also *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282. In *Boss v Kingston* [1963] 1 All ER 177, [1963] 1 WLR 99, DC, it was held that where the policy is limited to third party risks, an insurable interest in the vehicle is not necessary; but this decision must now be in doubt following criticism of it in *Dodson v Peter H Dodson Insurance Services (a firm)* [2001] 3 All ER 75, [2001] 1 WLR 1012, CA.

3 *Dodson v Peter H Dodson Insurance Services (a firm)* [2001] 3 All ER 75, [2001] 1 WLR 1012, CA.

4 *Dodson v Peter H Dodson Insurance Services (a firm)* [2001] 3 All ER 75, [2001] 1 WLR 1012, CA. As to the construction of policies see PARAS 83-89 ante.

5 *Jenkins v Deane* (1933) 150 LT 314.

6 As to public liability insurance see PARAS 690-691 ante.

UPDATE

720-723 Scope of a permitted driver clause ... Cover for the insured driving other cars

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(4) INSURANCE OF VEHICLE/724. Motor insurance as an example of property insurance.

(4) INSURANCE OF VEHICLE

724. Motor insurance as an example of property insurance.

As has been indicated elsewhere, a motorist is required to be insured only against third party liabilities in the limited statutory sense¹. The insurance operates by reference to the car proposed for insurance, but there is no obligation to insure the car itself. If, however, the proposer desires to do so, he can obtain insurance covering the car against fire or theft² or against any form of loss or damage. A fire insurance policy covers both a damage and a total loss risk according to the ordinary principles of fire insurance discussed elsewhere³. A theft insurance is usually linked with the statutory definition of 'theft'; the complications of this insurance are discussed elsewhere⁴.

1 See PARAS 706 et seq ante, 729 et seq post.

2 *Devco Holder Ltd v Legal & General Assurance Society Ltd* [1993] 2 Lloyd's Rep 567, CA; *Hayward v Norwich Union Insurance Ltd* [2001] EWCA Civ 243, [2001] 1 All ER (Comm) 545, [2001] Lloyd's Rep IR 410 (both cases concerning theft of car having key in ignition).

3 As to fire insurance see PARA 591 et seq ante.

4 See PARA 644 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(4) INSURANCE OF VEHICLE/725. Damage insurance.

725. Damage insurance.

Frequently a motor policy provides indemnity against damage to the car insured arising from accident or other causes apart from fire or theft, the most common cause of damage being the insured's own negligence. The cost of meeting damage claims can be very heavy from the insurers' point of view¹. The result has been the development of two common features in motor insurance, namely the knock-for-knock agreement and the excess and no claims bonus clause².

¹ Where the insurers have authorised a garage to carry out repairs to an insured car, they may sometimes be held to have contracted as principals in the transaction and are therefore personally liable for the cost: *Cooter and Green Ltd v Tyrrell* [1962] 2 Lloyd's Rep 377, CA; *Godfrey Davis Ltd v Culling and Hecht* [1962] 2 Lloyd's Rep 349, CA; *Brown and Davis Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997, CA. There may be a contract between the insurers and the garage to pay for the repairs and also a contract between the garage and the owner to carry out the repairs: *Charnock v Liverpool Corpn* [1968] 3 All ER 473, [1968] 1 WLR 1498, CA.

² See further PARAS 726-727 post.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(4) INSURANCE OF VEHICLE/726. Knock-for-knock agreements.

726. Knock-for-knock agreements.

The essence of a 'knock-for-knock' agreement is that, in the event of an accident involving more than one insured vehicle, each insurer carries the risk so far as concerns the damage to the car he has insured, whoever may be legally responsible for causing the damage. It is, however, an arrangement operative only between insurers, and there is no means of enforcing it against the individual insured. Therefore, if an insured, minded perhaps to avoid losing a 'no-claims bonus', pursues on his own a claim for damage to his car, it is no answer that he is entitled to receive or has already received indemnity for the damage from his own insurers¹. The fact that the claimant has insurance rights against his own insurers is irrelevant so far as the tortfeasor is concerned². Knock-for-knock agreements between insurers have fallen out of favour in recent years and are no longer used.

1 *Morley v Moore* [1936] 2 KB 359, [1936] 2 All ER 79, CA; *Alexander v Lang* 1967 SLT (Sh Ct) 64 (insurers cancelled policy after bearing total loss of insured's car under 'knock-for-knock' agreement; insured's attempt to recover premium from other driver failed for remoteness); *Hobbs v Marlowe* [1978] AC 16, [1977] 2 All ER 241, HL.

2 Cf *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1; *Simpson v Thomson* (1877) 3 App Cas 279, HL.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(4) INSURANCE OF VEHICLE/727. Excess and no-claims bonus clauses.

727. Excess and no-claims bonus clauses.

In order to avoid a multiplicity of claims for minor damage to the insured car two devices are usual among motor insurers. One device is to provide that the liability for damage up to a specified amount must be borne by the insured himself¹; the result is that the insured is deterred from making claims for any trivial mishap and, even in the case of a major mishap, the insurers are entitled to call on the insured to bear the amount which he has agreed to bear himself, and to recover it from him if they have paid it². Similarly, a rebate of premium is allowed in the form of a bonus if no claim is notified. The insured cannot, however, be deprived of the benefit of his no-claims bonus merely by reason of the fact that, without his having made a claim on his insurers, they have committed themselves to paying a claim pursuant to a knock-for-knock agreement with the insurers of another car which was demonstrably at fault in producing the relevant accident³. Where, as a result of a third party's negligence, the insured is involved in an accident and has to bear liability for damage up to the amount specified in the excess clause and he loses his no-claims bonus, he may include these items as part of any damages he claims from the third party; but the insurers are under no duty to assist the insured in his claim⁴.

1 An excess clause is also common in relation to third party claims, whether for injury or damage to property, in order to encourage greater care by a driver whose claims record is not good.

2 *Beacon Insurance Co Ltd v Langdale* [1939] 4 All ER 204, DC.

3 *Morley v Moore* [1936] 2 KB 359, [1936] 2 All ER 79, CA.

4 *Ironfield v Eastern Gas Board* [1964] 1 All ER 544n, [1964] 1 WLR 1125n.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(4) INSURANCE OF VEHICLE/728. Insurance against loss.

728. Insurance against loss.

In addition to cover against fire, theft or damage however caused, motor policies frequently provide cover against loss. The circumstances in which a person will be taken to have suffered a loss of his car when he has been induced to part with possession of, or property in, it by fraud have been previously considered¹.

¹ As to insurance against loss see generally paras 658-659 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(i) Origin and Nature of Compulsory Insurance/729. Persons requiring compulsory insurance.

(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES

(i) Origin and Nature of Compulsory Insurance

729. Persons requiring compulsory insurance.

Subject to certain qualifications¹, it is unlawful for any person² to use³, or to cause or permit⁴ any other person to use⁵, a motor vehicle⁶ on a road or other public place⁷ unless there is in force in relation to the use of the vehicle by that person or that other person⁸, as the case may be, such a policy of insurance, or such a security, in respect of third party risks as complies with the statutory requirements⁹.

This provision does not apply to:

- 181 (1) a vehicle owned¹⁰, at a time when the vehicle is being driven under the owner's control, by the council of a county or county district in England or Wales, the Broads Authority¹¹, the Common Council of the City of London, the council of a London borough, a National Park Authority¹², the London Fire and Emergency Planning Authority¹³, a joint authority¹⁴ (other than a police authority)¹⁵, or a joint board or joint committee in England or Wales which is so constituted as to include among its members representatives of any such council¹⁶;
- 182 (2) a vehicle owned by a police authority at a time when it is being driven under the owner's control, or a vehicle at a time when it is being driven for police purposes by or under the direction of a police constable or by a person employed by a police authority¹⁷;
- 183 (3) a vehicle owned by the Service Authority for the National Criminal Intelligence Service or the Service Authority for the National Crime Squad, at a time when it is being driven under the owner's control, or to a vehicle at a time when it is being driven for the purposes of the body maintained by such an Authority by or under the direction of a constable, or by a person employed by such an Authority¹⁸;
- 184 (4) a vehicle at a time when it is being driven on a journey to or from any place undertaken for salvage purposes¹⁹;
- 185 (5) the use of a vehicle for the purpose of its being furnished in pursuance of a requisitioning order²⁰;
- 186 (6) a vehicle owned by a health service body²¹, a Primary Care Trust²², a Local Health Board²³ or the Commission for Health Improvement²⁴, at a time when the vehicle is being driven under the owner's control²⁵;
- 187 (7) an ambulance owned by a national health service trust²⁶ at a time when the vehicle is being driven under the owner's control²⁷;
- 188 (8) a vehicle which is made available by the Secretary of State to any person, body or local authority in pursuance of the National Health Service Act 1977²⁸ at a time when it is being used in accordance with the terms on which it is made available²⁹;
- 189 (9) a vehicle owned by a person who has deposited and keeps deposited with the Accountant General of the Supreme Court the sum of £500,000 at a time when the vehicle is being driven under the owner's control³⁰;
- 190 (10) vehicles in the service of visiting forces³¹; or
- 191 (11) invalid carriages³².

1 For the exemptions see the text and notes 10-32 infra.

2 'Any person' does not merely mean any owner: *Williamson v O'Keefe* [1947] 1 All ER 307, DC.

3 'To use' means to have the use of a motor vehicle on a road: see *Elliott v Grey* [1960] 1 QB 367, [1959] 3 All ER 733, DC (car laid up in road; could be moved though not driven; insurance required). A person is a user only if he is the driver or the owner of the vehicle; but where the owner is not the driver he is a user only if the driver is employed by the owner under a contract of service and at the material time he is driving on his employer's business: *West Yorkshire Trading Standards Service v Lex Vehicle Leasing Ltd* [1996] RTR 70, DC; *Jones v DPP* [1999] RTR 1, 163 JP 121, DC. If at the controls, a pupil is normally the driver of the car: *Langman v Valentine* [1952] 2 All ER 803, DC; *Evans v Walkden* [1956] 3 All ER 64, [1956] 1 WLR 1019. An injury to a driver whilst crossing a road to obtain petrol to restart her car arises out of her use of the vehicle: *Dunthorne v Bentley* [1996] RTR 428, [1999] Lloyd's Rep IR 560, CA. As to the defence to a charge of being in contravention of these provisions see PARAS 732, 736 note 4 post.

4 As to the meaning of 'cause or permit' see PARA 720 note 2 ante.

5 Failure to perform the statutory duty to insure will involve a civil liability to a person injured by the uninsured vehicle: *Richards v Port of Manchester Insurance Co Ltd* (1943) 152 LT 261 (affd 152 LT 413, CA); *Monk v Warbey* [1935] 1 KB 75, CA; *Corfield v Groves* [1950] 1 All ER 488; cf *Daniels v Vaux* [1938] 2 KB 203, [1938] 2 All ER 271 (where the plaintiff's failure to commence an action in due time against the negligent driver, and not the failure of the owner to insure, was the real cause of the plaintiff's loss). The person injured is only entitled to recover against the owner for the amount of the damage which he has, in fact, suffered as a result of the owner's breach, ie the difference between the amount of damages awarded against the borrower of the vehicle and the amount which the borrower is able to pay in satisfaction: *Martin v Dean* [1971] 2 QB 208, [1971] 3 All ER 279. The statutory tort continues to exist despite changes in the law introduced on the implementation of EC Motor Insurance Directives and changes in practice following the adoption of the Motor Insurers' Bureau Agreements (as to which see PARAS 757-765 post): *Norman v Aziz* [2000] RTR 107, [2000] Lloyd's Rep IR 52, CA.

6 'Motor vehicle' means, subject to the Chronically Sick and Disabled Persons Act 1970 s 20 (as amended) (special provision about invalid carriages within the meaning of that Act) a mechanically propelled vehicle intended or adapted for use on roads: Road Traffic Act 1988 s 185(1). 'Invalid carriage', for the purposes of the Chronically Sick and Disabled Persons Act 1970, means a vehicle, whether mechanically propelled or not, constructed or adapted for use for the carriage of one person, being a person suffering from some physical defect or disability: s 20(2); cf note 32 infra. For the meaning of 'road' see note 7 infra. An autocycle is included unless the motor is dismantled: *Lawrence v Howlett* [1952] 2 All ER 74; *Floyd v Bush* [1953] 1 All ER 265, [1953] 1 WLR 242, DC. An autocross racing car, although not intended to be used on the roads under its own power, is a motor vehicle: *Nichol v Leach* [1972] RTR 476, DC.

7 'Road' means any highway and any other road to which the public has access, including bridges over which a road passes: Road Traffic Act 1988 s 192(1) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 78). A place to which the public has access is not necessarily a road (*Griffin v Squires* [1958] 3 All ER 468, [1958] 1 WLR 1106, DC), but may be (*Bugge v Taylor* [1941] 1 KB 198, DC (forecourt)); cf *Thomas v Dando* [1951] 2 KB 620, [1951] 1 All ER 1010, DC; and *Purves v Muir* 1948 JC 122; see also *Harrison v Hill* 1932 JC 13; *Knaggs v Elson* (1965) 109 Sol Jo 596, DC (both cases of private roads). A private road in a fenced-in factory or dock, which is not open to the public, is not a road: *O'Brien v Trafalgar Insurance Co Ltd* (1945) 61 TLR 225, CA; *Buchanan v Motor Insurers' Bureau* [1955] 1 All ER 607, [1955] 1 WLR 488; *Randall v Motor Insurers' Bureau* [1969] 1 All ER 21, [1968] 1 WLR 1900 (vehicle partly on private land partly on road held to be on road); *Cutter v Eagle Star Insurance Co Ltd*, *Clarke v Kato* [1998] 4 All ER 417, [1998] 1 WLR 1647, HL (public car park not road); *Inman v Kenny* [2001] EWCA Civ 35, [2001] PIQR P256 (grassy path in public park not road); *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769 (hotel car park not road). The words 'or other public place' were added by the Motor Vehicles (Compulsory Insurance) Regulations 2000, SI 2000/726, reg 2(1), (2) with effect from 3 April 2000 in direct response to the decision in *Cutter v Eagle Star Insurance Co Ltd*, *Clarke v Kato* supra and it is submitted that as a result some of the cases cited would now be decided differently.

8 In *Evans v Walkden* [1956] 3 All ER 64, [1956] 1 WLR 1019, a son aged 17 was at the controls, his father was in the passenger's seat, and the son was held not licensed to drive. See ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 207.

9 Road Traffic Act 1988 s 143(1) (amended by the Motor Vehicles (Compulsory Insurance) Regulations 2000, SI 2000/726, reg 2(1), (2)). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937 et seq. A local authority may prosecute for breach of this provision: *Middlesbrough Borough Council v Safeer* [2001] EWHC Admin 525, [2001] 4 All ER 630, [2002] 1 Cr App Rep 266, DC. The penalty for acting in contravention is, on summary conviction, a fine not exceeding level 5 on the standard scale: Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I

(amended by the Road Traffic Act 1991 s 26, Sch 2 paras 1, 26). As to the standard scale see PARA 22 note 9 ante.

As to the evidence which a police constable may require to be produced from a driver, and which an owner is under a duty to provide, that a motor vehicle is being driven in compliance with the Road Traffic Act 1988 s 143(1) (as amended) see ss 165, 170, 171 (all as amended); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARAS 645, 648. In the case of a motor vehicle which is within the exceptions set out in the text to notes 10-32 infra see the Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 7, Schedule Pt 1 Form E, Form F (amended by SI 1973/1821; SI 1974/792; SI 1974/2187; and SI 1992/1283). The issue of a certificate of ownership of exempt vehicles has been extended to include a passenger transport executive and its subsidiaries, and the London Transport Executive (now Transport for London: Greater London Authority Act 1999 s 297) and its wholly owned subsidiaries: Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, regs 4(1), 7(3), Schedule Pt 1 Form F.

10 'Owner' in relation to a vehicle which is the subject of a hiring agreement or hire-purchase agreement means the person in possession of the vehicle under that agreement: Road Traffic Act 1988 s 192(1). The provisions of Pt VI (ss 143-162) (as amended) do not apply to vehicles and persons in the public service of the Crown: s 183(1).

11 The Broads Authority is a body corporate established under the Norfolk and Suffolk Broads Act 1988 s 1 (as amended): see WATER AND WATERWAYS vol 101 (2009) PARA 734.

12 Is an authority established under the Environment Act 1995 s 63: see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526 et seq.

13 The London Fire and Emergency Planning Authority is a body corporate constituted under the Greater London Authority Act 1999 s 328: see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

14 Is a joint authority established under the Local Government Act 1985 Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

15 Road Traffic Act 1988 s 144(2)(a)(i) (amended by the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 9; the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 36; the Environment Act 1995 s 78, Sch 10 para 29; and the Greater London Authority Act 1999 s 328, Sch 29 Pt 1 para 54). As to police authorities see the Police Act 1996 s 3; and POLICE.

16 Road Traffic Act 1988 s 144(2)(a)(iii).

17 Ibid s 144(2)(b) (amended by the Greater London Authority Act 1999 ss 325, 423, Sch 27 para 61, Sch 34 Pt VII).

18 Road Traffic Act 1988 s 144(2)(ba) (added by the Police Act 1997 s 134(1), Sch 9 para 59). The Service Authority for the National Criminal Intelligence Service and the Service Authority for the National Crime Squad are bodies corporate established respectively under the Police Act 1997 s 1 (as amended), and s 47 (as amended): see POLICE.

19 Is pursuant to the Merchant Shipping Act 1995 Pt IX (ss 224-255) (as amended) (as to which see SHIPPING AND MARITIME LAW): Road Traffic Act 1988 s 144(2)(c) (amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 85). 'Salvage' means the preservation of a vessel which is wrecked, stranded or in distress, or the lives of persons belonging to, or the cargo or apparel of, such a vessel: Road Traffic Act 1988 s 161(1).

20 Is a direction under the Army Act 1955 s 166(2)(b) or the Air Force Act 1955 s 166(2)(b): Road Traffic Act 1988 s 144(2)(d).

21 Is as defined in the National Health Service and Community Care Act 1990 s 60(7) (as amended).

22 A Primary Care Trust is a trust established under the National Health Service Act 1977 s 16A (as added): see HEALTH SERVICES vol 54 (2008) PARA 111 et seq.

23 A Local Health Board is a board established under ibid s 16BA (as added): see HEALTH SERVICES vol 54 (2008) PARA 73.

24 The Commission for Health Improvement is a body corporate established under the Health Act 1999 s 19.

25 Road Traffic Act 1988 s 144(2)(da) (added by the National Health Service and Community Care Act 1990 s 60, Sch 8 Pt I para 4; and amended by the National Health Service Reform and Health Care Professions Act 2002 s 6(2), Sch 5 para 29; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 1999, SI 1999/2795, art 4; and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 23).

26 le a trust established under the National Health Service and Community Care Act 1990 Pt I (ss 1-26) (as amended): see HEALTH SERVICES vol 54 (2008) PARA 174 et seq.

27 Road Traffic Act 1988 s 144(2)(db) (added by the National Health Service and Community Care Act 1990 Sch 8 Pt I para 4).

28 le under the National Health Service Act 1977 s 23 or s 26 (as amended).

29 Road Traffic Act 1988 s 144(2)(e).

30 Ibid s 144(1) (amended by the Road Traffic Act 1991 s 20). See PARA 756 post. The sum to be deposited may be increased by order made by statutory instrument, a draft of which must first be laid before and approved by resolution of each House of Parliament: s 144(1A), (1B) (added by the Road Traffic Act 1991 s 20(1), (3)).

31 See the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, art 8.

32 Road Traffic Act 1988 s 143(4). 'Invalid carriage' means a mechanically propelled vehicle the weight of which unladen does not exceed 254 kg and which is specially designed and constructed, and not merely adapted, for the use of a person suffering from some physical defect or disability and used solely by such a person: s 185(1).

UPDATE

729 Persons requiring compulsory insurance

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 5--*Monk*, cited, distinguished: *Bretton v Hancock* [2005] EWCA Civ 404, [2005] Lloyd's Rep IR 454; and see PARA 720 note 4.

TEXT AND NOTES 8-32--Head (3) omitted: Serious Organised Crime and Police Act 2005 Sch 4 para 54. Add head (12) an ambulance owned by an NHS foundation trust, at a time when the vehicle is being driven under the owner's control: Road Traffic Act 1988 s 144(2)(dc) (added by the Health and Social Care (Community Health and Standards) Act 2003 Sch 4 para 74). Add head (13) a vehicle owned by the Care Quality Commission, at a time when the vehicle is being driven under the owner's control: Road Traffic Act 1988 s 144(2)(g) (added by SI 2004/2987; and amended by the Health and Social Care Act 2008 Sch 5 para 61).

TEXT AND NOTE 15--Road Traffic Act 1988 s 144(2)(a)(i) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 45; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 80.

TEXT AND NOTE 20--Road Traffic Act 1988 s 144(2)(d) repealed: Armed Forces Act 2006 Sch 17.

TEXT AND NOTE 25--Road Traffic Act 1988 s 144(2)(da) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 122; Health and Social Care Act 2008 Sch 5 para 61.

TEXT AND NOTE 24--Commission for Health Improvement abolished: 2003 Act s 44(1).

TEXT AND NOTES 27, 29--Road Traffic Act 1988 s 144(2)(db), (e) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 122.

NOTE 25--SI 1999/2795 revoked: National Health Service (Consequential Provisions) Act 2006 Sch 4.

TEXT AND NOTE 30--For 'Supreme Court' substitute 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(i) Origin and Nature of Compulsory Insurance/730. International motor insurance cards.

730. International motor insurance cards.

Visitors¹ to Great Britain² bringing in motor vehicles comply with the statutory requirements relating to compulsory insurance³ if they hold a valid⁴ insurance card⁵.

1 'Visitor' means a person bringing a motor vehicle into Great Britain, making only a temporary stay and named in an insurance card (see note 4 *infra*) as the insured or user of the vehicle, and includes a hiring visitor who brings a hired motor vehicle into Great Britain but no other hiring visitor; and 'hiring visitor' means a person to whom a hired motor vehicle (see note 4 *infra*) is let on hire, making a temporary stay in Great Britain and named as the insured or user of the vehicle in the insurance card in which that vehicle is specified: Motor Vehicles (International Motor Insurance Card) Regulations 1971, SI 1971/792, reg 3(1).

2 For the meaning of 'Great Britain' see PARA 8 note 3 *ante*.

3 As to the statutory requirements see PARAS 729 *ante*, 731 *et seq post*. See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937 *et seq*.

4 A card is valid if: (1) the motor vehicle it specifies is brought into the United Kingdom during the specified period of validity (Motor Vehicles (International Motor Insurance Card) Regulations 1971, SI 1971/792, reg 4(1)(a)); (2) its application in Great Britain is indicated on it (reg 4(1)(b)); (3) all relevant information provided for in it is inscribed in it (reg 4(1)(c)); (4) it has been signed by the visitor, the insurer named in it and, in the case of a hired vehicle, every hiring visitor named in the card as its hirer or user (reg 4(1)(d)). For the meaning of 'United Kingdom' see PARA 8 note 3 *ante*.

'Hired motor vehicle' means a motor vehicle (a) designed for private use with seats for not more than eight persons excluding the driver; (b) specified in an insurance card; (c) last brought into Great Britain by a person making a temporary stay; and (d) owned and let for hire by a person whose business includes the letting of vehicles for hire and whose principal place of business is outside the United Kingdom: reg 3(1).

5 *Ibid* regs 5, 6 (amended by SI 1977/895). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937 *et seq*. 'Insurance card' means an international motor insurance card issued under the authority of a Foreign Bureau or of the British Bureau, which is green and is in either English or a foreign language containing the particulars specified in, and set out in two pages as shown in, the Motor Vehicles (International Motor Insurance Card) Regulations 1971, SI 1971/792, Sch 1: reg 3(1) (reg 3(1) amended and Sch 1 substituted by SI 1977/895). See also the Motor Vehicles (International Motor Insurance Card) Regulations 1971, SI 1971/792, reg 4(2). 'Foreign Bureau' means a central organisation set up by motor insurers in any country outside the United Kingdom, the Isle of Man and the Channel Islands for the purpose of giving effect to international arrangements for the insurance of motorists against third party risks when entering countries where such insurance is compulsory and with which the British Bureau has entered into such an arrangement; and 'British Bureau' means the Motor Insurers' Bureau (see PARAS 757-765 *post*): reg 3(1). As to vehicles brought from Northern Ireland see reg 10.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(i) Origin and Nature of Compulsory Insurance/731. Persons able to issue valid policies.

731. Persons able to issue valid policies.

An insurance policy is not effective for the purposes of compulsory insurance unless it is issued by an authorised insurer¹, that is an insurer who is a member of the Motor Insurers' Bureau². If the authorised insurer ceases to be a member of the Bureau, he is still liable on any policy issued before ceasing to be a member, or on any obligation arising from any such policy³.

1 Road Traffic Act 1988 s 145(2). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 945.

2 Ibid ss 95(2), 145(5) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, arts 312, 313 respectively). 'Insurer' means either a person who has permission under the Financial Services and Markets Act 2000 Pt 4 (ss 40-55) to effect or carry out relevant contracts of insurance, or an EEA firm of the kind mentioned in Sch 3 para 5(d) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to effect or carry out relevant contracts of insurance: Road Traffic Act 1988 s 95(3) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 312). As to the grant of permission see PARA 35 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 348 et seq.

3 See the Road Traffic Act 1988 s 145(6).

UPDATE

731-732 Persons able to issue valid policies, Nature of insurance required

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(i) Origin and Nature of Compulsory Insurance/732. Nature of insurance required.

732. Nature of insurance required.

The conditions to be fulfilled in order to render the use of a motor vehicle lawful are that (1) there must be a policy of insurance in force¹ in relation to the use² of the vehicle on a road or other public place; and (2) the policy must comply with the relevant statutory requirements³. A cover note is a policy of insurance for this purpose⁴. The relevant statutory requirements are that the policy, apart from being issued by an authorised insurer, must provide cover against certain specified liabilities⁵.

1 A policy is not invalid merely because it covers the vehicle when being unlawfully used (*Leggate v Brown* [1950] 2 All ER 564, DC: see PARA 711 text to note 8 ante), or is voidable, but not in fact avoided, by the insurers (*Goodbarne v Buck* [1940] 1 KB 107, [1939] 4 All ER 107 (affd [1940] 1 KB 771, [1940] 1 All ER 613, CA); *Durrant v Maclaren* [1956] 2 Lloyd's Rep 70; *Adams v Dunne* [1978] RTR 281, [1978] Crim LR 365, DC).

2 Where the construction of a policy makes it doubtful whether it was applicable to the use in question, a statement by the insurers that they would regard it as applicable is accepted: *Pilbury v Brazier* [1951] 1 KB 340, [1950] 2 All ER 835; *Carnhill v Rowland* [1953] 1 All ER 486, DC. However, if the construction of the policy is clear, the court takes account of that alone: *Carnhill v Rowland* supra; see also *Bryan v Forrow* [1950] 1 All ER 294, DC. For the position where the effectiveness of the policy depends on the holding of, or the right to hold, a driving licence see *Mumford v Hardy* [1956] 1 All ER 337, [1956] 1 WLR 163; cf *Edwards v Griffiths* [1953] 2 All ER 874, [1953] 1 WLR 1199, DC; and see PARA 720 text and notes 7-9 ante. A legally binding policy is essential: *Boss v Kingston* [1963] 1 All ER 177 at 180, [1963] 1 WLR 99 at 105, DC.

3 Road Traffic Act 1988 s 143(1), (2) (s 143(1) as amended): see PARA 729 ante. See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937.

4 Ibid s 161(1). A temporary cover note must be accepted and relied upon so that it constitutes an enforceable contract: *Taylor v Allon* [1966] 1 QB 304, [1965] 1 All ER 557, DC.

5 See the Road Traffic Act 1988 s 145 (as amended); and PARAS 733-737 post.

UPDATE

731-732 Persons able to issue valid policies, Nature of insurance required

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/ (ii) Risks required to be Insured/733. Liabilities required to be covered.

(ii) Risks required to be Insured

733. Liabilities required to be covered.

In order to comply with the statutory requirements, a policy must provide insurance cover in respect of any liability which may be incurred by such persons or classes of persons as are specified in the policy in respect of the death of, or bodily injury to, any person¹, or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain². Liability must be insured whether it is the result of negligence or the result of deliberate running down. In the latter case the insured is debarred by public policy from making a claim against his insurers, but the third party may himself enforce against the insurers any judgment which he has obtained against the insured or he may make a claim from the Motor Insurers' Bureau in respect of any uninsured use of the vehicle³.

In the case of a vehicle normally based in the territory of another member state of the European Union⁴, the policy must provide insurance cover in respect of any civil liability which may be incurred by the person or persons insured as a result of an event related to the use of the vehicle in Great Britain if (1) according to the law of that territory, he or they would be required to be insured in respect of a civil liability which would arise under that law as a result of that event if the place where the vehicle was used when the event occurred were in that territory; and (2) the cover required by that law would be higher than that required by the provisions mentioned⁵ above⁶.

In the case of a vehicle normally based in Great Britain, the policy must also provide insurance cover in respect of any liability which may be incurred by the insured in respect of the use of the vehicle⁷ and of any trailer⁸, whether or not coupled, in the territory, other than Great Britain and Gibraltar, of each of the member states of the European Union, according to (a) the law on compulsory insurance against civil liability in respect of the use of vehicles of the state in whose territory the event giving rise to the liability occurred; or (b) if it would give higher cover, the law which would be applicable under Part VI of the Road Traffic Act 1988 if the place where the vehicle was used when that event occurred were in Great Britain⁹.

Cover must also be provided for any liability incurred in respect of payment for emergency treatment¹⁰.

1 'Any person' refers to anyone injured by the insured's or permitted driver's use of the vehicle, but excluding the permitted driver himself: *Cooper v Motor Insurers' Bureau* [1985] QB 575, [1985] 1 All ER 449, CA.

2 Road Traffic Act 1988 s 145(1), 145(3)(a) (amended by the Motor Vehicle (Compulsory Insurance) Regulations 2000, SI 2000/726, reg 2(1), (3)). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 945. For the meaning of 'road' and as to the meaning of 'other public place' see PARA 729 note 7 ante. For the meaning of 'Great Britain' see PARA 8 note 3 ante. For the exceptions to this provision see PARAS 735-737 post. Liability in respect of an intentional criminal act must be covered: *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA.

3 *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769. As to the Motor Insurers' Bureau and victims of uninsured drivers see PARA 757 et seq post.

4 See the Interpretation Act 1978 s 5, Sch 1 (meaning of 'Communities'), applying the European Communities Act 1972 s 1, Sch 1.

5 See the text to notes 1-2 supra.

6 Road Traffic Act 1988 s 145(3)(aa) (added by the Motor Vehicle (Compulsory Insurance) Regulations 1992, SI 1992/3036, reg 2(1)).

7 For the meaning of 'motor vehicle' see PARA 729 note 6 ante. As to the use of a vehicle see PARA 729 note 3 ante.

8 'Trailer' means a vehicle drawn by a motor vehicle: Road Traffic Act 1988 s 185(1).

9 Ibid s 145(3)(b) (amended by the Motor Vehicle (Compulsory Insurance) Regulations 1992, SI 1992/3036, reg 2(2)). As to the Road Traffic Act 1988 Pt VI (ss 143-162) (as amended) see also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937 et seq.

10 Ibid s 145(3)(c). 'Emergency treatment' is medical or surgical treatment or examination immediately required as a result of bodily injury (including fatal injury) to a person caused by, or arising out of, the use of a motor vehicle on a road, such treatment or examination being effected by a legally qualified medical practitioner: s 158(1). The person who was using the vehicle at the time of the event out of which the bodily injury arose must pay to the practitioner (or, where the emergency treatment is effected by more than one practitioner, to the practitioner by whom it is first effected): (1) a fee of £21.30 in respect of each person in whose case the emergency treatment is effected by him; and (2) a sum equal to 41p for every complete mile and additional part of a mile in respect of any distance in excess of two miles which he must cover (a) to proceed from the place from which he is summoned to the place where the emergency treatment is carried out by him; and (b) to return to the place from which he is summoned: s 158(2) (amended by the Road Traffic Accidents (Payments for Treatment) Order 1995, SI 1995/889, reg 3). As to claims in respect of emergency treatment see further PARA 741 post.

UPDATE

733-737 Risks required to be Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/ (ii) Risks required to be Insured/734. Liabilities not required to be covered.

734. Liabilities not required to be covered.

A policy of insurance is not required (1) to cover liability in respect of the death, arising out of and in the course of employment, of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment¹; or (2) to provide insurance of more than £250,000 for all liabilities for damage to property caused by, or arising out of, any one accident² involving the vehicle³; or (3) to cover liability for damage to the vehicle⁴; or (4) to cover liability for damage to goods carried for hire or reward in or on the vehicle or in or on any trailer⁵ (whether or not coupled) drawn by the vehicle⁶; or (5) to cover any liability of a person for damage to property in his custody or control⁷; or (6) to cover any contractual liability⁸.

1 Road Traffic Act 1988 s 145(4)(a). This is subject to s 145(4A) (as added): see PARA 735 text and note 2 post.

2 Any reference to an accident includes a reference to two or more causally related accidents: *ibid* s 161(3).

3 *Ibid* s 145(4)(b).

4 *Ibid* s 145(4)(c).

5 For the meaning of 'trailer' see PARA 733 note 8 ante. For the meaning of 'motor vehicle' see PARA 729 note 6 ante.

6 Road Traffic Act 1988 s 145(4)(d).

7 *Ibid* s 145(4)(e).

8 *Ibid* s 145(4)(f).

UPDATE

733-737 Risks required to be Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

734 Liabilities not required to be covered

TEXT AND NOTE 3--For '£250,000' read '£1,000,000': 1998 Act s 145(4)(b) (amended by the Motor Vehicles (Compulsory Insurance) Regulations 2007, SI 2007/1426).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/ (ii) Risks required to be Insured/735. Exclusion of employees.

735. Exclusion of employees.

A policy is not required to cover liability in respect of the death of or bodily injury sustained by a person in the employment of a person insured by the policy where the death or injury arises out of and in the course of that employment¹. In the case of a person carried in or upon a vehicle, or entering or getting on to or alighting from a vehicle, these provisions do not apply unless cover in respect of the liability is in fact provided pursuant to a requirement of the Employers' Liability (Compulsory Insurance) Act 1969².

The distinctions which are involved in the application of this exclusion are often very finely drawn. Thus, a director of a company is not, as such, an employee of the company³, but a managing director⁴ or a working director⁵ may be, in the light of the contract which he holds. Again, an accident in a public thoroughfare may arise out of and in the course of employment if, at the relevant time, the employee is performing a duty to his employers, such as responding to an emergency call to duty⁶, but the mere fact that he is on call in the event of an emergency is not sufficient unless an emergency arises⁷. Similarly, if an employer provides transport to enable his employees to travel to and from work, an accident which occurs on the journey does not arise out of and in the course of the employment unless the employee is under a duty, either contractually or as a matter of necessity, to use the provided transport⁸. However, if an accident occurs on the employer's private premises, for example on a private picking up place, while the employee is attempting to enter provided or public transport, the accident is one arising out of and in the course of the employment⁹.

1 Road Traffic Act 1988 s 145(4)(a). This exclusion is framed in the language of the Workmen's Compensation Acts and is presumably intended to reflect the well-established distinction in the insurance world between public liability risks and employers' liability risks. As to the Workmen's Compensation Acts (repealed) see PARA 678 ante.

2 Road Traffic Act 1988 s 145(4A) (added by the Motor Vehicle (Compulsory Insurance) Regulations 1992, SI 1992/3036, reg 2(3)). As to the Employers' Liability (Compulsory Insurance) Act 1969 see PARAS 685-689 ante; and EMPLOYMENT vol 39 (2009) PARA 40 et seq.

3 *Normandy v Ind Coope & Co Ltd* [1908] 1 Ch 84; *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46; cf *Moriarty v Regent's Garage and Engineering Co Ltd* [1921] 1 KB 423 (director's remuneration held to be a salary) (revsd without deciding this point [1921] 2 KB 766, CA).

4 *Trussed Steel Concrete Co Ltd v Green* [1946] Ch 115.

5 *R v Stuart* [1894] 1 QB 310; *Bloor v Liverpool Docking and Carrying Co Ltd* [1936] 3 All ER 399, CA.

6 *Blee v London and North Eastern Rly Co* [1938] AC 126, [1937] 4 All ER 270, HL; see also *Dunn v Lockwood & Co* [1947] 1 All ER 446, CA.

7 *Alderman v Great Western Rly Co* [1937] AC 454, [1937] 2 All ER 408, HL.

8 *St Helens Colliery Co Ltd v Hewitson* [1924] AC 59, HL; applied in *Vandyke v Fender (Sun Insurance Office Ltd, third party)* [1970] 2 QB 292, [1970] 2 All ER 335. Such an accident is now, however, deemed to arise out of and in the course of employment for the purpose of national insurance against industrial injuries: see the Social Security Contributions and Benefits Act 1992 s 99; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 135.

9 *Weaver v Tredegar Iron and Coal Co Ltd* [1940] AC 955, [1940] 3 All ER 157, HL.

UPDATE

733-737 Risks required to be Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/ (ii) Risks required to be Insured/736. Exclusion is only of employee of a person insured.

736. Exclusion is only of employee of a person insured.

Normally the person insured by an insurance policy is the insured himself, and it is his needs that are in the contemplation of both himself and his insurers when the policy is issued. Complications arise, however, if the policy contains a permitted driver clause, because then the permitted driver will be a person insured by the policy¹ and the exclusion will in such a case only operate as regards a person in the employment of the permitted driver². However, it does not follow from this that an offence is committed by an insured if there is no permitted driver clause in his policy, and the vehicle is sent out in the charge of an employee of the insured who holds no personal insurance³. Many vehicles driven on the roads belong to limited companies, and the driving of them inevitably has to be done by an employee of the company⁴. The liabilities which have to be covered, however, are the company's liabilities only; if there is no permitted driver clause in the policy, there is no breach of the statutory provisions merely because the driver's personal responsibilities, for example to a passenger who is a fellow employee of the employers but not an employee of the driver, are not covered⁵.

1 le for the purpose of the Road Traffic Act 1988 s 145(1), (3) (as amended): see PARAS 731-735 ante.

2 *Richards v Cox* [1943] 1 KB 139, [1942] 2 All ER 624, CA.

3 *Lees v Motor Insurers' Bureau* [1952] 2 All ER 511; on appeal [1953] 1 WLR 620, CA. See PARA 722 text and note 4 ante.

4 Cf *Lester Bros (Coal Merchants) Ltd v Avon Insurance Co Ltd* (1942) 72 Ll L Rep 109; and PARA 720 note 9 ante. A person charged with using a motor vehicle in contravention of the Road Traffic Act 1988 s 143(1) (as amended) (see PARA 729 ante) cannot be convicted if he proves that (1) the vehicle did not belong to him and was not in his possession under a contract of hiring or of loan; (2) he was using the vehicle in the course of his employment; and (3) he neither knew nor had reason to believe that there was not in force in relation to the vehicle such a policy of insurance or security as complied with the statutory requirements: s 143(3).

5 As to the extent of cover afforded to a permitted driver see PARA 722 ante.

UPDATE

733-737 Risks required to be Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/ (ii) Risks required to be Insured/737. Insurance of passengers.

737. Insurance of passengers.

Where a person uses a motor vehicle in circumstances requiring compulsory insurance¹, then, if any other person is carried in or upon the vehicle², any antecedent agreement³ or understanding between them (whether intended to be legally binding or not) is of no effect so far as it purports, or might be held either (1) to negative or restrict the user's liability⁴; or (2) to impose any conditions with respect to the enforcement of such liability⁵. The fact that a person so carried has willingly accepted the risk of negligence on the part of the user must not be treated as negating any such liability⁶.

1 Ie under the Road Traffic Act 1988 s 143 (as amended) (see PARA 729 ante): s 149(1).

2 References to a person being carried in or upon a vehicle include references to a person entering or getting on to or alighting from the vehicle: *ibid* s 149(4)(a).

3 The reference to any antecedent agreement is a reference to one made at any time before liability arose: *ibid* s 149(4)(b).

4 Ie under *ibid* s 145 (as amended) (see PARA 733 ante): s 149(2)(a).

5 *Ibid* s 149(2)(b).

6 *Ibid* s 149(3).

UPDATE

733-737 Risks required to be Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iii) Obligations of Insurers/738. Obligation to indemnify.

(iii) Obligations of Insurers

738. Obligation to indemnify.

Notwithstanding anything in any enactment¹, authorised insurers issuing a policy pursuant to the statutory requirements must indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons². From this provision there is derived the right of a permitted driver to claim directly against the insurers even though he is in no strict sense a party to the contract of insurance³. However, no right of action is conferred by this provision on injured third parties⁴; nor are the insurers deprived by it of their normal rights to repudiate a policy on the ground of misrepresentation or non-disclosure⁵.

1 This qualification seems to have been inserted with the Life Assurance Act 1774 in mind: see *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 40 Com Cas 76 at 83-85, CA, per Scrutton LJ; *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246. However, that Act probably does not apply at all: *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282; see PARA 537 ante.

2 Road Traffic Act 1988 s 148(7). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 948. As to an authorised insurer see PARA 731 ante.

3 *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250, [1945] 1 All ER 316, CA; *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246; and as to the rights of the permitted driver see PARA 721 ante.

4 *Greenlees v Port of Manchester Insurance Co* 1933 SC 383.

5 *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246. As to the duty of insurers to satisfy judgments against persons insured in respect of third party risks, notwithstanding that the insurers may be entitled to repudiate the policy, see PARA 746 post.

UPDATE

738-741 Obligations of Insurers

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iii) Obligations of Insurers/739. Obligation to issue certificate of insurance.

739. Obligation to issue certificate of insurance.

An insurance policy is of no effect, for the purposes of the statutory provisions relating to compulsory insurance¹, unless and until there is delivered to the person by whom the policy is effected² a certificate of insurance in the prescribed form and containing such particulars of any conditions subject to which the policy is issued, and of any other matters, as may be prescribed³. Separate certificates of insurance are not required for cover notes, as the prescribed particulars must be printed on the back⁴. A certificate of insurance is merely a certificate; it does not enlarge the scope of the cover which is in fact afforded by the policy⁵. It is an offence, punishable on summary conviction with a fine not exceeding level 4 on the standard scale, to issue a certificate of insurance which is known to be false in a material particular⁶. It is an offence, similarly punishable on summary conviction, to make any false statement or withhold any material information for the purpose of obtaining a certificate of insurance⁷.

1 Ie the Road Traffic Act 1988 Pt VI (ss 143-162) (as amended).

2 Delivery to a finance company which is not an agent of the insured is ineffective: *Starkey v Hall* [1936] 2 All ER 18, DC.

3 Road Traffic Act 1988 s 147(1). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 947. 'Prescribed' means prescribed by regulations (made under s 160 by the Secretary of State): s 160(1). The Secretary of State concerned is the Secretary of State for Transport, as to whom see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 509. Different forms and particulars may be prescribed for different circumstances: s 147(3). The relevant regulations in force are the Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217 (amended by SI 1973/1821; SI 1974/792; SI 1974/2187; SI 1981/1567; SI 1992/1283; SI 1997/97; SI 1999/2392; and SI 2001/2266). For the forms of certificate required to be used by insurance companies see the Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 5, Schedule Pt 1. As to the printing and contents of the form see Schedule Pt 2 (amended by SI 1981/1567; and SI 1992/1283). Every certificate of insurance must be issued not later than four days after the date on which the policy to which it relates is issued or renewed: Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 6. Where, to the knowledge of a company, a policy issued by it ceases to be effective without the consent of the person to whom it was issued, otherwise than by effluxion of time or by reason of his death, the company must forthwith notify the Secretary of State of the date on which the policy ceased to be effective: reg 11. Provision is made for the return of certificates to the insurance company when, with the consent of the person to whom it was issued, a policy is transferred or is suspended or ceases to be effective, otherwise than by effluxion of time (reg 12), and for the replacement of certificates which have become defaced or have been lost or destroyed (reg 13).

4 Ibid reg 5(3), Schedule Pt 1 Form C.

5 *Richards v Port of Manchester Insurance Co Ltd* (1934) 152 LT 261 (affd 152 LT 413, CA); *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 50 TLR 528, CA; *Spraggon v Dominion Insurance Co Ltd* (1941) 69 Ll L Rep 1, CA.

6 Road Traffic Act 1988 s 175 (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 2 para 13(a)); Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I (amended by the Road Traffic (Consequential Provisions) Act 1988 ss 3, 4, Sch 1 Pt I, Sch 2 para 13(c)). As to the standard scale see PARA 22 note 9 ante. As from a day to be appointed the Road Traffic Act 1988 s 175 is substituted and the Road Traffic Offenders Act 1988 Sch 2 Pt I is further amended by the Transport Act 1982 s 24. At the date at which this volume states the law no such day had been appointed.

7 Road Traffic Act 1988 s 174(5); Road Traffic Offenders Act 1988 Sch 2 Pt I.

UPDATE

738-741 Obligations of Insurers

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

739 Obligation to issue certificate of insurance

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--SI 1972/1217 further amended: SI 2010/1115.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iii) Obligations of Insurers/740. Obligation to keep records.

740. Obligation to keep records.

Authorised insurers¹ must keep a record of all policies, securities and certificates issued by them², showing:

- 192 (1) the number of the policy or security³;
- 193 (2) the name and address of the person to whom the policy or security is issued⁴;
- 194 (3) either the name of every person whose liability is covered by the policy or security, or where it is not reasonably possible for the company to keep a record of those names, a description of the persons whose liability is covered by the policy or security⁵;
- 195 (4) in respect of vehicles covered by the policy or security:
 - 5 1. (a) the registration number of every vehicle specifically identified by that number in the policy or security⁶, with a description sufficient to enable it to be identified by a police officer⁷; and
 - 2. (b) a description of every other vehicle or class of vehicles which is identified in the policy or security other than by reference to a registration number⁸;
- 6 196 (5) the date on which the policy or security comes into force and the date on which it expires⁹;
- 197 (6) in the case of a policy, the conditions subject to which the person or persons whose liability is covered will be indemnified by the insurer¹⁰;
- 198 (7) in the case of a security, the conditions subject to which the undertaking by the giver of the security will be implemented¹¹.

This record must be preserved for seven years from the date of expiry of the policy or security¹².

Every specified body¹³ must keep a record of the motor vehicles owned by it in respect of which a policy or security has not been obtained, and of any certificates issued by it under the regulations in respect of such motor vehicles, and of the withdrawal or destruction of any such certificates¹⁴.

1 As to authorised insurers see PARA 731 ante.

2 Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 10(1) (substituted by SI 2001/2266). As to securities see PARA 755 post.

3 Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 10(1)(a) (as substituted: see note 2 supra).

4 Ibid reg 10(1)(b) (as substituted: see note 2 supra).

5 Ibid reg 10(1)(c) (as substituted: see note 2 supra).

6 Ibid reg 10(1)(d)(i) (as substituted: see note 2 supra).

7 Ibid reg 10(1)(e) (as substituted: see note 2 supra).

8 Ibid reg 10(1)(d)(ii) (as substituted: see note 2 supra).

9 Ibid reg 10(1)(f) (as substituted: see note 2 supra).

10 Ibid reg 10(1)(g) (as substituted: see note 2 supra).

11 Ibid reg 10(1)(h) (as substituted: see note 2 supra).

12 Ibid reg 10(4) (substituted by SI 2001/2266).

13 'Specified body' means any authority mentioned in the Road Traffic Act 1988 s 144(2)(a) (see PARA 729 text and notes 10-16 ante), a passenger transport executive and its subsidiaries, and the London Transport Executive (now Transport for London: Greater London Authority Act 1999 s 297) and its wholly owned subsidiaries: Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 4(1).

14 Ibid reg 10(2). Any company, specified body or other person by whom records of documents are required by the regulations to be kept must, without charge, furnish to the Secretary of State or to any chief officer of police on request any particulars of the documents, and may provide copies of those records, in electronic form, to the Motor Insurers' Bureau or, if the Bureau so requests, to a subsidiary company nominated by it: reg 10(5) (a), (b) (as substituted: see note 12 supra). As to the Motor Insurers' Bureau see PARA 757 post. As to the Secretary of State see PARA 739 note 3 ante.

UPDATE

738-741 Obligations of Insurers

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iii) Obligations of Insurers/741. Obligation to pay for hospital treatment.

741. Obligation to pay for hospital treatment.

Authorised insurers¹ are not merely obliged to indemnify the insured against payments he has to make in respect of emergency treatment given by medical practitioners², they are also made directly responsible for paying expenses reasonably incurred by hospitals which provide treatment, whether as an in-patient or as an out-patient, to a person who has died or sustained injury arising out of the use of the insured vehicle on a road or in a place to which the public has a right of access³. The conditions to be fulfilled are that: (1) a payment is made, whether with or without admission of liability, in respect of the death or bodily injury in question by the authorised insurers under or in consequence of a policy issued under the statutory provisions relating to compulsory insurance⁴; and (2) the treatment has been given to the knowledge of the authorised insurers⁵.

The amount of the reasonable expenses must be calculated, in the case of an in-patient, on the basis of the average daily cost, for each in-patient, of the maintenance of the hospital and the staff and the maintenance and treatment of the in-patients⁶, and, in the case of an out-patient, on the basis of reasonable expenses actually incurred⁷. However, any money actually received by the hospital in payment of a specific charge for treatment, not being money received under a contributory scheme, must be deducted⁸. The amount to be paid must not exceed £2,949 for each person treated as an in-patient or £295 for each person treated as an out-patient⁹.

Payment must be made to the hospital¹⁰.

1 As to authorised insurers see PARA 731 ante.

2 See the Road Traffic Act 1988 ss 145(3)(c), 158 (as amended), 159 (as amended); para 733 ante; and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 945.

3 Ibid s 157(1). See *Barnet Group Hospital Management Committee v Eagle Star Insurance Co Ltd* [1960] 1 QB 107, [1959] 3 All ER 210. See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 957. 'Hospital' means an institution which provides medical or surgical treatment for in-patients other than a health service hospital within the meaning of the National Health Service Act 1977, a military hospital for the purposes of the Road Traffic (NHS Charges) Act 1999 s 15, or any institution carried on for profit: Road Traffic Act 1988 s 161(1) (substituted by the Road Traffic (NHS Charges) Act 1999 s 18(3)).

4 Ie under the Road Traffic Act 1988 s 145 (as amended) (see PARAS 731, 733 ante): s 157(1)(a), (b). In a claim arising out of an accident involving a motor vehicle on a road or in a public place where the damages claimed include a sum for hospital expenses, and the defendant or his insurer pays that sum to the hospital under s 157 the defendant must give notice of that payment to the court and all the other parties to the proceedings: *Practice Direction--Offers to Settle and Payments into Court* PD 36 para 11.2. As to payment into court see CIVIL PROCEDURE vol 11 (2009) PARAS 742-744.

5 Road Traffic Act 1988 s 157(1)(c). The insurers must have knowledge at the time when payment is made: *Barnet Group Hospital Management Committee v Eagle Star Insurance Co Ltd* [1960] 1 QB 107, [1959] 3 All ER 210.

6 Road Traffic Act 1988 s 157(3)(a).

7 Ibid s 157(3)(b).

8 Ibid s 157(1).

9 Ibid s 157(2) (amended by the Road Traffic Accidents (Payments for Treatment) Order 1995, SI 1995/889, art 2).

10 Road Traffic Act 1988 s 159(1) (amended by the Road Traffic (NHS Charges) Act 1999 s 18(2)).

UPDATE

738-741 Obligations of Insurers

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

741 Obligation to pay for hospital treatment

NOTE 3--Definition of 'hospital' in 1988 Act s 161(1) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 123.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iv) Third Parties' Rights under the Policy/742. General background.

(iv) Third Parties' Rights under the Policy

742. General background.

At common law a person injured by reason of another person's wrongdoing has no right of action against insurers who have undertaken to indemnify the wrongdoer; his only cause of action is against the other person who has committed the wrong, whether the wrong falls to be regarded as a tort or as a breach of contract¹. The first invasion of this principle occurred when the Third Parties (Rights against Insurers) Act 1930 was enacted. This Act enables a third party who has a claim against an insured to establish a direct right of action against the insured's insurers if the insured becomes insolvent; if this condition is fulfilled, the third party is afforded such remedies as the insured had against his insurers².

It was realised that, unless some alterations were made in the rights to which the third party was subrogated by the Third Parties (Rights against Insurers) Act 1930, those rights would frequently be of little, if any, value. Accordingly, it was provided that certain conditions in the insured's policy were to be of no effect in relation to a claim by a person to whom an insured was under a compulsorily insurable liability³.

1 As to rights of subrogation in tort and contract see PARAS 197-198 ante.

2 As to the application of the Third Parties (Rights against Insurers) Act 1930 see PARAS 679-684 ante.

3 Ie by the Road Traffic Acts 1930, 1934 (both repealed), now replaced by the Road Traffic Act 1988.

UPDATE

742-745 Third Parties' Rights under the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iv) Third Parties' Rights under the Policy/743. Extension of conditions avoided as against third party.

743. Extension of conditions avoided as against third party.

Where a certificate of insurance has been delivered to the person by whom the policy has been effected¹ certain conditions of the policy which purport to restrict the policy in respect of those liabilities for which insurance is compulsory² are of no effect³. The conditions specified are any condition purporting to restrict the insurance by reference to any of the following matters: (1) the age or physical or mental condition of the person driving the vehicle⁴; (2) the condition of the vehicle⁵; (3) the number of persons that the vehicle carries⁶; (4) the weight or physical characteristics of the goods that the vehicle carries⁷; (5) the time at which, or the areas within which, the vehicle is used⁸; (6) the horsepower or cylinder capacity or value of the vehicle⁹; (7) the carrying on the vehicle of any particular apparatus¹⁰; and (8) the carrying on the vehicle of any particular means of identification other than the statutory¹¹ identification marks¹².

In relation to compulsory insurable claims, so far as the policy restricts the insurance of persons to use of the vehicle for specified purposes (for example, social, domestic and pleasure purposes) of a non-commercial character, or excludes use for hire or reward, or business or commercial use, or use for specified purposes of a business or commercial character, use on a journey in the course of which one or more passengers are carried at separate fares is treated as falling within the restriction or not falling within the exclusion if specified conditions are satisfied¹³. This provision is designed to cover car sharing arrangements.

1 Ie under the Road Traffic Act 1988 s 147: see PARA 739 ante.

2 Ie under *ibid* s 145 (as amended): see PARA 733 ante.

3 *Ibid* s 148(1). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 948. This also applies in relation to securities: see PARA 755 post.

4 *Ibid* s 148(2)(a). There is sometimes a condition prohibiting the driving of the vehicle by a person under the age of 18 or over the age of 70. See also *National Farmers' Union Mutual Insurance Society Ltd v Dawson* [1941] 2 KB 424.

5 Road Traffic Act 1988 s 148(2)(b); and see *Jones and James v Provincial Insurance Co Ltd* (1929) 46 TLR 71; *Brown v Zurich General Accident and Liability Insurance Co Ltd* [1954] 2 Lloyd's Rep 243.

6 Road Traffic Act 1988 s 148(2)(c); and see *Houghton v Trafalgar Insurance Co Ltd* [1953] 2 Lloyd's Rep 18 (affd [1954] 1 QB 247, [1953] 2 All ER 1409, CA) where such a provision might have been useful.

7 Road Traffic Act 1988 s 148(2)(d); and see *Provincial Insurance Co Ltd v Morgan* [1933] AC 240, HL; *Jones v Welsh Insurance Corp Ltd* [1937] 4 All ER 149; cf *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA.

8 Road Traffic Act 1988 s 148(2)(e); and see *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL.

9 Road Traffic Act 1988 s 148(2)(f).

10 *Ibid* s 148(2)(g); and see *Pictorial Machinery Ltd v Nicolls* (1940) 164 LT 248.

11 As to the statutory identification marks see the Vehicles Excise and Registration Act 1994 Pt II (ss 21-28); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 518 et seq.

12 Road Traffic Act 1988 s 148(2)(h) (amended by the Vehicle Excise and Registration Act 1994 s 63, Sch 3 para 24(1)). As to the right of the insurers to recover payments made by virtue of these provisions see PARA 744 post.

13 Road Traffic Act 1988 s 150(1). This also applies to securities: s 150(1). It is immaterial how the restrictions or exclusions are worded: s 150(3). The conditions are that: (1) the vehicle is not adapted to carry more than eight passengers and is not a motor cycle; (2) the fare or aggregate of the fares paid in respect of the journey does not exceed the running costs of the vehicle for the journey (including an appropriate amount in respect of depreciation and general wear); and (3) the arrangements for the payment of fares by the passenger or passengers were made before the journey began: s 150(2). The words 'fare' and 'separate fares' have the same meaning as in the Public Passenger Vehicles Act 1981 s 1(4): Road Traffic Act 1988 s 150(4); see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 950.

UPDATE

742-745 Third Parties' Rights under the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

743 Extension of conditions avoided as against third party

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iv) Third Parties' Rights under the Policy/744. Rights of insurers who make payment outside the scope of policy.

744. Rights of insurers who make payment outside the scope of policy.

The statutory provisions which extend the classes of conditions avoided as against third parties¹ do not require the insurers to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability², and any sum paid by them in or towards the discharge of any liability of any person which is covered by the policy by virtue only of that enactment is recoverable by them from that person³.

A condition in a policy providing that no liability will arise under the policy in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy is of no effect in connection with the liabilities for which compulsory insurance⁴ is required⁵. This provision does not, however, render void any provision in a policy requiring the person insured to repay to the insurers any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties⁶. Repayment would probably be obtainable, even in the absence of such a provision, as there can hardly be consideration for a payment which, under the terms of the contract, the insurers are not obliged to make, and the payment would, therefore, be recoverable as money paid under statutory duress to the use of the insured or for a consideration which had failed⁷.

1 Ie the Road Traffic Act 1988 s 148(1), (2) (as amended): see PARA 743 ante.

2 Ibid s 148(3). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 948.

3 Ibid s 148(4). The provisions set out in this paragraph also apply to securities: see PARA 755 post.

4 Ie under ibid s 145 (as amended): see PARA 733 ante.

5 Ibid s 148(5).

6 Ibid s 148(6).

7 See RESTITUTION vol 40(1) (2007 Reissue) PARA 66 et seq.

UPDATE

742-745 Third Parties' Rights under the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(iv) Third Parties' Rights under the Policy/745. Insolvency of the insured.

745. Insolvency of the insured.

Where a certificate of insurance has been delivered to the person by whom a policy has been effected¹, the happening in relation to any person insured by the policy of any such event as is mentioned in the general statutory provisions which relate to the subrogation of third parties to the rights of the insured on the insolvency of the insured² does not affect any such liability of that person as is required to be covered by compulsory insurance³.

1 le under the Road Traffic Act 1988 s 147(1): see PARA 739 ante.

2 See the Third Parties (Rights against Insurers) Act 1930 s 1(1), (2) (both as amended); and PARA 679 ante.

3 Road Traffic Act 1988 s 153(1), (2). Section 153(1) applies notwithstanding anything in the Third Parties (Rights against Insurers) Act 1930, but does not affect any rights against the insurer conferred by that Act on the person to whom the liability was incurred: Road Traffic Act 1988 s 153(3). This provision also applies in relation to securities: see PARA 755 post. Its intention seems to be to make it clear that the insured's liability remains unaffected by his bankruptcy and the third party's consequential rights by subrogation: see PARA 681 ante. However, it may be that doubt was felt as to whether the Third Parties (Rights against Insurers) Act 1930 had effectively overruled *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA, and *Hood's Trustees v Southern Union General Insurance Co of Australasia* [1928] Ch 793, CA. For the effect of these decisions see PARA 677 ante.

UPDATE

742-745 Third Parties' Rights under the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(v) Third Parties' Rights outside the Policy/746. Third parties' direct rights of action against insurers.

(v) Third Parties' Rights outside the Policy

746. Third parties' direct rights of action against insurers.

In practice, the provisions entitling an injured third party to be subrogated to the rights of the insured on the insolvency of the insured¹ were found to be insufficient to protect the interests of third parties, even in conjunction with the provisions rendering insurance compulsory against third party risks² and rendering certain conditions in policies ineffective against third parties³. A more drastic provision was accordingly enacted which imposes on insurers⁴, once a certificate of insurance has been issued to the person effecting the policy⁵, the obligation to pay to any person entitled to the benefit of a judgment coming within the provision⁶ any sum payable under the judgment, including any amount payable in respect of costs and any sum payable in respect of interest by virtue of any enactment relating to interest on judgments⁷, notwithstanding that the insurers may be entitled to avoid or cancel, or may have avoided or cancelled, the policy⁸.

However, the obligation is limited by certain conditions and qualifications⁹ set out subsequently¹⁰.

Most recently provisions giving a third party a direct right of action against an insurer have been introduced¹¹. The third party will, therefore, in most cases have the option of either suing the insurer directly under the European Communities (Rights against Insurers) Regulations 2002, or of suing the insured and enforcing the judgment against the insurer in the event that it is not satisfied by the insured. It is anticipated that third parties will, wherever possible, use the former mechanism. There will be cases, however, in which only the latter possibility is open to the third party, for instance in a deliberate running down case¹² or where the policy has been cancelled but the certificate of insurance has not been surrendered to the insurer¹³.

1 As to these provisions see PARAS 679-684 ante. For the saving of the rights of third parties against the insured see PARA 742 ante.

2 As to compulsory insurance against third party risks see PARA 729 ante.

3 As to conditions avoided as against third parties see PARAS 743-744 ante.

4 As to the application of the Road Traffic Act 1988 ss 151, 152 (both as amended) to persons who give securities see PARA 755 post.

5 *Ie* under *ibid* s 147 (see PARA 739 ante): s 151(1).

6 See *ibid* s 151(2)-(4); and PARAS 748-749 post.

7 As to interest on judgments see the Judgments Act 1838 s 17 (as amended); the Administration of Justice Act 1970 s 44(1); the Judgment Debts (Rate of Interest) Order 1993, SI 1993/564, which specifies the rate as 8%; and CIVIL PROCEDURE vol 12 (2009) PARA 1149.

8 Road Traffic Act 1988 s 151(5). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951. However, as to the right of insurers to obtain a declaration that a policy is void see s 152(2) (as amended); and PARA 750 post. As to the effect of such a declaration see note 9 *infra*. As to the extra-statutory Motor Insurers' Bureau Agreement, by which recourse to the Road Traffic Act 1988 s 151 (as amended) is in general rendered no longer necessary, see PARA 757 post.

9 See *ibid* s 151(5), by which the liability of the insurers to pay is expressed to be subject to the provisions of s 151 (as amended), and s 152 (as amended), which sets out exceptions; and *Croxford v Universal Insurance Co Ltd*, *Norman v Gresham Fire and Accident Insurance Society Ltd* [1936] 2 KB 253 at 272-274, [1936] 1 All ER 151 at 160-162, CA, per Slesser LJ, and at 280-281 and 166-167 per Scott LJ. Insurers are liable in the circumstances and under the conditions specified in the whole of the Road Traffic Act 1988 ss 151, 152 (both as amended), and not merely those specified in s 151(5). Insurers may protect themselves from liability under s 151 (as amended) if they obtain a declaration under s 152(2) (as amended): see PARA 750 post.

10 See PARAS 748-751 post.

11 Ie the European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061, which came into force on 19 January 2003: see PARA 747 post.

12 As to liability in a deliberate running down case see PARA 733 text and note 3 ante.

13 As to the surrender of certificates of insurance see PARA 754 post.

UPDATE

746-749 Third Parties' Rights outside the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(v) Third Parties' Rights outside the Policy/747. Right to issue proceedings against insurers.

747. Right to issue proceedings against insurers.

Where a person, who is a resident of a member state of the European Union¹ (or a resident of Iceland, Norway or Liechtenstein) has a cause of action against an insured person² in tort and that cause of action arises out of an accident³, that person may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle⁴, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person⁵.

1 As to the European union see EUROPEAN COMMUNITIES.

2 'Insured person' means a person insured under a policy of insurance satisfying the requirements of the Road Traffic Act 1988 s 145 (as amended) (see PARA 733 ante): European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061, reg 2(1), (3).

3 Ibid reg 3(1). 'Accident' means an accident on a road or other public place in the United Kingdom caused by, or arising out of, the use of any insured vehicle; 'vehicle' means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer whether or not coupled, which is normally based in the United Kingdom: reg 2(1). A vehicle is normally based in the United Kingdom if it bears a registration plate, or in cases where no registration is required an insurance plate or a distinguishing sign analogous to a registration plate, or where none of these is required the keeper of the vehicle is permanently resident in the United Kingdom: reg 2(2). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

4 A vehicle is insured if there is in force in relation to the use of that vehicle on a road or other public place in the United Kingdom by the insured person a policy of insurance (including a covering note) which fulfils the requirements of the Road Traffic Act 1988 s 145 (as amended): European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061, reg 2(3).

5 Ibid reg 3(2).

UPDATE

746-749 Third Parties' Rights outside the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(v) Third Parties' Rights outside the Policy/748. Judgments required to be satisfied.

748. Judgments required to be satisfied.

In the event that the third party wishes to sue the insured and to enforce the judgment against the insurer, rather than to sue the insurer directly¹, the following conditions are applicable.

The first condition of the obligation of the insurers to satisfy a judgment² is that there is a judgment³.

The second condition is that the judgment must be in respect of a liability which is required to be covered⁴ by compulsory insurance⁵. In other words, the only person who can maintain a right of action direct against the insurers is a person falling within the class of third parties whose bodily injury or death or damage to whose property is required to be covered by a motor policy⁶.

The third condition is that the liability is, in fact, covered by the terms of the policy, or would be covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy⁷. For this purpose, conditions declared to be invalid as against a third party⁸ are ignored, but if, even after ignoring all such conditions, the relevant use of the vehicle puts it outside the scope of the policy, the insurers are left immune. The most important clause in this connection is the 'description of use' clause. The insured is criminally liable if he uses his car for purposes outside the scope of his insurance⁹ and, in addition to his criminal liability, he has to bear unaided the cost of compensating third parties injured by his use if he is negligent. Subject to the statutory provision rendering certain conditions invalid against third parties¹⁰, the insurers are not obliged to carry a wider scope of liability than they have agreed by their policy to carry.

The fourth condition is that the judgment must be against a person insured by the policy¹¹. This language covers a permitted driver as well as the person by whom the policy has been effected¹².

1 As to the rights of a third party to sue the insurer direct see PARA 747 ante.

2 Ie under the Road Traffic Act 1988 s 151 (as amended): see PARA 746 ante.

3 Ibid s 151(1). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951. Proceedings for a declaration of liability against the insurers before judgment will not normally be allowed: *Carpenter v Ebbelwhite* [1939] 1 KB 347, [1938] 4 All ER 41, CA.

4 Ie under the Road Traffic Act 1988 s 145 (as amended): see PARA 733 ante.

5 Ibid s 151(2). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951. This includes liability for deliberate running down: *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769.

6 As to the persons falling within this class see PARAS 733-737 ante.

7 Road Traffic Act 1988 s 151(5). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951. Any provision in the policy which restricts the insurance to the holding of a licence to drive a vehicle is to be disregarded: s 151(3). In these circumstances, the insurer has a right of recovery against the insured person: s 151(7)(a); and see PARA 752 post. See also *Robb v McKechnie* 1936 JC 25 (condition against use of trailer; accident while trailer used).

8 See the Road Traffic Act 1988 s 148 (as amended); and PARAS 742-745 ante.

9 For the definition of risk by reference to use see PARAS 712, 717-719 ante.

10 See the Road Traffic Act 1988 s 148 (as amended); and PARAS 742-745 ante.

11 Ibid s 151(2). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951. An insurer is bound to satisfy a judgment even if it is obtained against a person not insured by the policy, subject to certain exceptions in the case of vehicles stolen or taken: s 151(4), (5). The insurer has rights of recovery against the user or an insured person who caused or permitted the use of the vehicle: s 151(8).

12 *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250, [1945] 1 All ER 316, CA.

UPDATE

746-749 Third Parties' Rights outside the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(v) Third Parties' Rights outside the Policy/749. Qualifications of the obligation.

749. Qualifications of the obligation.

The qualifications affecting the obligation of insurers¹ to meet a judgment against the insured in favour of a third party² are as described in heads (1) to (5) below:

- 199 (1) The insurers must be given notice of the bringing of the proceedings in which the judgment is obtained, either before, or within seven days after, the commencement of those proceedings³. Normally the issue of a claim form operates as the commencement of proceedings⁴, but it may happen that the relevant claim only comes on to the scene at a later stage; in such a case the initiation of the relevant claim is the material date⁵. The notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings⁶, although no particular formality is required, and the notice may be written or oral⁷. The essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained⁸.
- 200 (2) No sum is payable in respect of a judgment so long as a stay of execution pending an appeal is operative⁹.
- 201 (3) The insurers are not liable to pay the amount of the judgment if, before the happening of the accident causing the third party's injury or death or damage to property, the policy has been cancelled, either by mutual consent or by virtue of a provision contained in the policy and, in addition, one or other of the following conditions has been fulfilled:
 - 7 3. (a) before the accident there has been a surrender of the certificate of insurance, or a statutory declaration¹⁰ by the person to whom it was delivered that it has been lost or destroyed¹¹;
 4. (b) after the accident, but before the expiration of 14 days from the taking effect of the cancellation of the policy, there has been a surrender of the certificate or such a statutory declaration as has been previously mentioned¹²; or
 5. (c) either before or after the accident, but within the period of 14 days from the taking effect of the cancellation of the policy, the insurers have commenced proceedings¹³ in respect of the failure to surrender the certificate¹⁴.
- 8 202 (4) Insurers are given protection where the policy has been obtained by misrepresentation or non-disclosure, provided they in turn fulfil certain stringent conditions¹⁵.
- 203 (5) In the case of damage to property, if the amount of the judgment is more than £250,000, the insurer need only satisfy a proportion of the judgment¹⁶.

1 Ie under the Road Traffic Act 1988 s 151 (as amended): see PARA 748 ante.

2 See *Croxford v Universal Insurance Co Ltd*, *Norman v Gresham Fire and Accident Insurance Society Ltd* [1936] 2 KB 253, [1936] 1 All ER 151, CA; and PARA 746 note 9 ante.

3 Road Traffic Act 1988 s 152(1)(a). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952.

4 See CPR 7.2.

5 If the relevant claim is first made by counterclaim in third party proceedings (now Part 20 claims), the service or filing of the counterclaim is the commencement of the proceedings: *Cross v British Oak Insurance Co* [1938] 2 KB 167, [1938] 1 All ER 383. As to Part 20 claims see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

6 *Herbert v Railway Passengers Assurance Co Ltd* [1938] 1 All ER 650; *Nawaz v Crowe Insurance Group* [2003] All ER (D) 337 (Feb), CA (oral notice to legal secretary sufficient).

7 *Ceylon Motor Insurance Association Ltd v Thambugala* [1953] AC 584, [1953] 2 All ER 870, PC; *Desouza v Waterlow* [1999] RTR 71, CA; *Nawaz v Crowe Insurance Group* [2003] All ER (D) 337 (Feb), CA. Cf *Harrington v Pinkey* [1989] RTR 345, [1989] 2 Lloyd's Rep 310, CA; *Wake v Page* [2001] RTR 291, CA; *McBlain v Dolan* [2001] Lloyd's Rep IR 309, Ct of Sess.

8 *Desouza v Waterlow* [1999] RTR 71, CA. There is no need to plead the giving of notice: *Baker v Provident Accident and White Cross Insurance Co Ltd* [1939] 2 All ER 690.

9 Road Traffic Act 1988 s 152(1)(b). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952.

10 See *ibid* s 147(4); Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 12(3), (4).

11 Road Traffic Act 1988 s 152(1)(c)(i). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952. References to a certificate of insurance in any provision relating to the surrender, or the loss or destruction, of a certificate of insurance are, in relation to policies under which more than one certificate is issued, to be construed as references to all the certificates and, where any copy of a certificate has been issued, are to be construed as including a reference to that copy: s 161(2).

12 *Ibid* s 152(1)(c)(ii). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952.

13 *Ie* presumably under *ibid* s 147(4): see PARA 754 post.

14 *Ibid* s 152(1)(c)(iii). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952.

15 As to the rights of insurers in respect of misrepresentation and non-disclosure see PARA 750 post.

16 Road Traffic Act 1988 s 151(6).

UPDATE

746-749 Third Parties' Rights outside the Policy

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

749 Qualifications of the obligation

NOTES 6, 7--*Nawaz*, cited, reported at [2003] Lloyd's Rep IR 471.

TEXT AND NOTE 16--Head (5). For '£250,000' read '£1m': 1998 Act s 151(6) (amended by SI 2007/1426).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vi) Rights of the Insurers and Duties of the Insured/750. Rights in respect of misrepresentation and non-disclosure.

(vi) Rights of the Insurers and Duties of the Insured

750. Rights in respect of misrepresentation and non-disclosure.

No sum is payable by insurers¹ under the provisions relating to payment on a judgment² if, in proceedings commenced before or within three months after the commencement of the proceedings in which the judgment was given³, they obtain a declaration that, apart from any provision contained in the policy, they are entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material⁴ fact or by a representation of fact which was false in some material particular, or, if they have already avoided the policy on any such ground, a declaration that they were entitled to avoid it on that ground apart from any provision contained in it⁵. Since the right of the insurers to relief from liability is dependent upon there being non-disclosure of a material fact or misrepresentation of fact which is false in a material particular apart from any provision contained in the policy, it is irrelevant for this purpose that the insurers may have stipulated in the policy that a particular matter is to be treated as material for the purposes of the policy⁶. Any such provision has to be ignored and the statutory definition of materiality must alone be looked at. This provides that 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions⁷.

It seems that a provision in a policy that nothing contained in it is to affect the right of any person to recover against the insurers⁸ does not prevent the insurers from relying on material non-disclosure or misrepresentation for the purpose of obtaining a declaration⁹.

1 As to the application of the Road Traffic Act 1988 ss 151, 152 (both as amended) in relation to persons who give securities see PARA 755 post.

2 *Id* s 151 (as amended): see PARA 748 ante.

3 As to the date which is treated as the date of the commencement of proceedings see PARA 749 text to notes 4-5 ante.

4 See the text and note 7 infra.

5 Road Traffic Act 1988 s 152(2). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952. As to the operation of this provision see generally *Croxford v Universal Insurance Co Ltd*, *Norman v Gresham Fire and Accident Insurance Society Ltd* [1936] 2 KB 253, [1936] 1 All ER 151, CA; and PARA 746 note 9 ante. See also *National Farmers Mutual Insurance Co Ltd v Tully* 1935 SLT 574 (false statements in proposal; disclosure of true facts to insurance agent not sufficient: see further PARAS 64-68 ante). If the policy has been cancelled by mutual consent, no proceedings for a declaration appear to be necessary even if the insurer's consideration for the agreement derives from allegations of misrepresentation or non-disclosure, provided the conditions laid down in the Road Traffic Act 1988 s 152(1) (see PARA 749 text to notes 10-14 ante) as to the certificate of insurance are fulfilled; see however *Croxford v Universal Insurance Co Ltd* supra at 282 and 168 per Scott LJ.

6 For such a stipulation see *Dawsons Ltd v Bonnin* [1922] 2 AC 413, HL. As to the duties laid down by the contract see further PARA 51 ante.

7 Road Traffic Act 1988 s 152(2) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 66). For facts found to be material see *Norman v Gresham Fire and Accident Insurance Society Ltd* (1935) 52 Ll L Rep 292 at 301 (on appeal [1936] 2 KB 253, [1936] 1 All ER 151, CA) (cancellation of other policies); *Cleland v London General Insurance Co Ltd* (1935) 51 Ll L Rep 156, CA (previous convictions); *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408, CA (a fire insurance case; non-disclosure of previous refusal of motor

insurance held material); *Taylor v Eagle Star Insurance Co Ltd* (1940) 67 Ll L Rep 136 (previous convictions); see also *Merchants' and Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196, [1937] 2 All ER 767, CA; *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246 (misrepresentation of ownership of car; declaration made against absent defendant); *Merchants and Manufacturers Insurance Co Ltd v Hunt and Thorne* [1941] 1 KB 295, [1941] 1 All ER 123, CA (age and convictions of driver of car); *Broad v Waland* (1942) 73 Ll L Rep 263 (age of proposer). For facts found not to be material see *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 2 KB 53, [1942] 1 All ER 529, CA (question in proposal form as to driving experience; non-disclosure that proposer had held only provisional licence); see also *Mackay v London Insurance Co* (1935) 51 Ll L Rep 201 (proceedings by insured against insurers; statements in answer to questions in proposal that no other insurer had required from insured increased premiums or special conditions and that proposer had not been convicted; insured three years before, when aged 18, had insured motor-cycle with excess of £2 10s (£2.50) and had been fined 10s (50p) for having insufficient brakes; insured's answers not material, though insurers not liable as accuracy of insured's answer made basis of contract by stipulation therein). As to the ineffectiveness of such stipulations in relation to applications under the Road Traffic Act 1988 s 152(2) (as amended) see PARAS 746, 748-749 ante.

8 Ie under ibid s 151 (as amended): see PARAS 746, 748-749 ante.

9 See *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 1 All ER 529 at 535 per Atkinson J (affd without reference to this point [1942] 2 KB 53, [1942] 1 All ER 529, CA) disagreeing with the view expressed by Stable J in *Merchants and Manufacturers Insurance Co Ltd v Hunt* [1940] 4 All ER 205 at 211-212 (affd on other grounds [1941] 1 KB 295, [1941] 1 All ER 123, CA).

UPDATE

750-754 Rights of the Insurers and Duties of the Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vi) Rights of the Insurers and Duties of the Insured/751. Notice required of insurers' declaration proceedings.

751. Notice required of insurers' declaration proceedings.

It would be manifestly unfair that a third party should be prejudiced by insurers obtaining a declaration of avoidance of the policy¹ without his having any opportunity to contest their claim. Accordingly, insurers are not to derive any benefit from any judgment obtained in declaration proceedings commenced after the commencement of the third party's proceedings² unless, either before or within seven days after commencing the declaration proceedings, the insurers have given notice to the injured third party of their proceedings, specifying the non-disclosure or misrepresentation on which they propose to rely³. Any person receiving such a notice is then given a right to be made a party to the declaration proceedings⁴ so as to contest the insurers' right to repudiate, even if the insured himself does not choose to do so. If the injured third party has not commenced his proceedings before the insurers' declaration proceedings he has at common law a right to be added as defendant to the insurers' proceedings which might deprive him of his statutory rights⁵. The injured third party being then, if joined, a party to the proceedings, any matters relied on must be proved by evidence admissible against him; evidence which is admissible only as against the insured will not suffice⁶. On the other hand, it is no objection to a declaration validly obtained that the insured defendant failed to appear or to defend⁷; nor are declaration proceedings necessary if the policy has been rescinded, not on the ground of misrepresentation or non-disclosure, but by the mutual consent of the insurers and insured⁸.

1 le under the Road Traffic Act 1988 s 152(2) (as amended): see PARA 750 ante.

2 As to the date when proceedings are deemed to be commenced see PARA 749 text to notes 4-5 ante.

3 Road Traffic Act 1988 s 152(3). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 952. Insurers are bound by the terms of the notice and cannot afterwards extend them: *Contingency Insurance Co Ltd v Lyons* (1939) 65 Ll L Rep 53, CA; *Merchants and Manufacturers Insurance Co Ltd v Hunt and Thorne* [1941] 1 KB 295, [1942] 1 All ER 123, CA; *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 2 KB 53, [1942] 1 All ER 529, CA; *Trafalgar Insurance Co Ltd v McGregor* [1942] 1 KB 275, CA.

4 Road Traffic Act 1988 s 152(4).

5 *Zurich General Accident and Liability Insurance Co v Livingston* 1938 SC 582.

6 *Merchants and Manufacturers Insurance Co Ltd v Hunt and Thorne* [1941] 1 KB 295, [1941] 1 All ER 123, CA. As to the scope of disclosure in such an action see *Merchants' and Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196, [1937] 2 All ER 767, CA.

7 *Guardian Assurance Co Ltd v Sutherland* [1939] 2 All ER 246.

8 *Croxford v Universal Insurance Co Ltd*, *Norman v Gresham Fire and Accident Insurance Society Ltd* [1936] 2 KB 253, [1936] 1 All ER 151, CA. The requirement as to surrender of the certificate of insurance must, however, be satisfied: see PARA 754 post.

UPDATE

750-754 Rights of the Insurers and Duties of the Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning

of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vi) Rights of the Insurers and Duties of the Insured/752. Rights of insurers against the insured.

752. Rights of insurers against the insured.

If insurers, by virtue of the provisions relating to payments on judgments¹, become liable to pay to a third party a sum in excess of what, under the policy, they would be liable to pay to their insured in respect of the relevant accident, they are entitled to recover the excess from the insured². It would seem, therefore, that, where the insurers would not be liable to pay anything under their policy by reason of misrepresentation or non-disclosure giving them a right to repudiate, they are entitled to recover from the insured anything which they are compelled by the statutory provisions to pay, whether or not they seek to obtain the relief³ which the statutory provisions afford them⁴.

1 le the Road Traffic Act 1988 s 151 (as amended): see PARAS 746, 748 ante.

2 Ibid s 151(7)(b). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 951.

3 As to rights of insurers in respect of misrepresentation and non-disclosure see PARA 750 ante.

4 For examples of policies providing expressly for repayment of all sums which the insurers would not have been liable to pay but for the statutory provisions see PARA 750 note 9 ante.

UPDATE

750-754 Rights of the Insurers and Duties of the Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vi) Rights of the Insurers and Duties of the Insured/753. Duty to give information as to insurance.

753. Duty to give information as to insurance.

Any person against whom a claim is made in respect of a compulsorily insurable liability¹ must, on demand by or on behalf of the person making the claim, state whether or not he was, in fact, insured in respect of the liability by a policy having effect for the purpose of the statutory provisions relating to compulsory insurance, or would have been insured by such a policy if his insurer had not avoided or cancelled the policy². If he was or, but for the avoidance or cancellation of his policy, would have been so insured, he must give such particulars of his insurance as were specified in his certificate³ of insurance⁴. Failure to comply with these requirements without reasonable excuse, or wilfully making any false statement in reply to such a demand, is an offence⁵. Subject to the necessary adaptations, these provisions apply where a security instead of a policy has been issued⁶.

1 Ie a liability under the Road Traffic Act 1988 s 145 (as amended) (see PARAS 729, 733 ante): s 154(1).

2 Ibid s 154(1)(a). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 954.

3 Ie the certificate delivered pursuant to ibid s 147: see PARA 739 ante.

4 Ibid s 154(1)(b)(i). Where no certificate is delivered under s 147, he must give the following particulars: (1) the registration mark or other identifying particulars of the vehicle concerned; (2) the number or other identifying particulars of the insurance policy issued in respect of the vehicle; (3) the name of the driver; and (4) the period of cover: s 154(1)(b)(ii).

5 Ibid s 154(2). The offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I. As to the standard scale see PARA 22 note 9 ante.

6 Road Traffic Act 1988 s 154(1). As to the issue of a security as an alternative to a policy see PARA 755 post.

UPDATE

750-754 Rights of the Insurers and Duties of the Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vi) Rights of the Insurers and Duties of the Insured/754. Duty to surrender certificate of insurance.

754. Duty to surrender certificate of insurance.

Where a policy is cancelled by mutual consent or by virtue of any provision in the policy, the person to whom the certificate of insurance was delivered¹ must, within seven days of the cancellation taking effect, surrender the certificate to the insurers or make a statutory declaration² as to its having been lost or destroyed³, if that is the case⁴. Any failure to comply with these requirements is an offence⁵. These provisions apply subject to the necessary adaptations where a security instead of a policy has been issued⁶.

1 Ibid under the Road Traffic Act 1988 s 147(1) (see PARA 739 ante): s 147(4).

2 Every statutory declaration must be delivered to the insurers in the same manner as if it were a certificate: Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 12(3).

3 References to a certificate of insurance in any provision relating to the surrender, or the loss or destruction, of a certificate of insurance are, in relation to policies under which more than one certificate is issued, to be construed as references to all the certificates and, where any copy of a certificate has been issued, are to be construed as including a reference to that copy: Road Traffic Act 1988 s 161(2). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 947.

4 Ibid s 147(4).

5 Ibid s 147(5). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: Road Traffic Offenders Act 1988 s 9, Sch 2 Pt I. As to the standard scale see PARA 22 note 9 ante.

6 As to the issue of a security see PARA 755 post.

UPDATE

750-754 Rights of the Insurers and Duties of the Insured

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vii) Statutory Alternatives to Insurance/755. Security as an alternative to a policy.

(vii) Statutory Alternatives to Insurance

755. Security as an alternative to a policy.

The place of an insurance policy for the purposes of compulsory protection against third party risks may be taken by a security which must satisfy certain conditions¹. The security must be given either by an authorised insurer² or by some body of persons which carries on in the United Kingdom the business of giving securities of the same kind and has deposited with the Accountant General of the Supreme Court the sum of £15,000 in respect of that business³. The security must consist of an undertaking by the giver of the security, subject to any conditions specified in it, to make good any failure by the owner of the vehicle, or such other persons or classes of persons as may be specified in the security, duly to discharge any liability which may be incurred by him or them⁴. In the case of liabilities arising out of the use of a motor vehicle on a road or other public place in Great Britain⁵, the amount secured need not exceed, in the case of a public service vehicle⁶, £25,000, and in any other case, £5,000⁷. Any person wishing to deposit with the Accountant General the sum of £15,000 may apply to the Secretary of State⁸ for a warrant, which is sufficient authority for the Accountant General to issue a direction for the payment into the Bank of England to the credit of his account by the person named in the warrant of the £15,000, which is to be credited in the books of the Accountant General to an account entitled 'ex parte the depositor'⁹. The depositor may deposit in lieu, wholly or in part, of the money deposit, an equivalent amount of securities¹⁰. A security is of no effect until a certificate of security has been delivered by the party giving the security to the person to whom it is given¹¹. The statutory provisions relating to the duty of insurers to satisfy judgments against persons insured in respect of third party risks¹², the continuance of the liability of the insured notwithstanding the statutory subrogation of a third party on the insolvency of the insured to the insured's rights against the insurers¹³, the classes of conditions which are avoided as against third parties¹⁴, the duty of persons against whom claims are made to give information as to insurance¹⁵ and the duty to surrender certificates on the cancellation of policies¹⁶ apply in relation to securities having effect for purposes of compulsory protection against third party risks as they apply in relation to policies of insurance. The obligation to keep certain records also applies¹⁷.

¹ See the Road Traffic Act 1988 ss 143(1) (as amended), 146(1); and PARA 729 ante. See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 937.

² As to authorised insurers see PARA 731 ante.

³ Road Traffic Act 1988 s 146(2). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

⁴ Ibid s 146(3). See also PARA 756 text to note 3 post.

⁵ For the meaning of 'Great Britain' see PARA 8 note 3 ante.

⁶ I.e. within the meaning of the Public Passenger Vehicles Act 1981 (see s 1 (as amended)); and ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1136 et seq.

⁷ Road Traffic Act 1988 s 146(4) (amended by the Motor Vehicles (Compulsory Insurance) Regulations 2000, SI 2000/726, reg 2(1), (4)).

⁸ I.e. the Secretary of State for Transport: Motor Vehicles (Third-Party Risks Deposits) Regulations 1992, SI 1992/1284, reg 3.

9 Ibid reg 4.

10 Ie securities in which cash under the control of, or subject to, the order of the court may for the time being be invested (their value being taken at a price as near as may be to, but not exceeding, the current market price), and in that case the Secretary of State may vary the warrant accordingly: *ibid* reg 4 proviso. The permitted securities in which money may be invested are those specified in the Trustee Investment Act 1961 Sch 1 Pt I, Pt II paras 1-10A, 12, and Pt III paras 2, 3, as supplemented by Pt IV (all as amended): Motor Vehicles (Third-Party Risks Deposits) Regulations 1992, SI 1992/1284, regs 3, 5(1).

The issue of any warrant or any error in such warrant does not render the Secretary of State or the person signing the warrant on his behalf in any manner liable for or in respect of any money or security deposited in court, or any securities for the time being representing the same, or the interest, dividends or income accruing due on them: reg 7. As to the investment of deposits and the payment of interest on investments see reg 5. As to the payment out of court of deposits where it is just and equitable, and in particular where a person who has made a deposit otherwise complies with the provisions relating to compulsory insurance against third party risks, or, providing that subsisting liabilities have been met, where such person ceases to own or to control the use of a motor vehicle, or a person who has made a deposit ceases altogether to carry on in the United Kingdom the business of giving securities, see reg 6. Subject to these regulations, the relevant provisions of the Court Funds Rules 1987 apply to deposits made, or having effect as if made, in pursuance of the Road Traffic Act 1988 s 144(1) (as amended) or s 146(2): Motor Vehicles (Third-Party Risks Deposits) Regulations 1992, SI 1992/1284, reg 8.

11 Road Traffic Act 1988 s 147(2). The certificate must be in the prescribed form and contain prescribed particulars: s 147(2). See the Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, which also apply to insurance certificates; as to which see PARA 739 ante. Different forms and particulars may be prescribed for different circumstances: Road Traffic Act 1988 s 147(3).

12 Ie *ibid* ss 151, 152 (as amended): see PARAS 746-752 ante.

13 Ie *ibid* s 153: see PARA 745 ante.

14 Ie *ibid* ss 148-150 (s 148 as amended): see PARA 743 ante.

15 Ie *ibid* s 154: see PARA 753 ante.

16 Ie *ibid* s 147(4), (5): see PARA 754 ante.

17 Ie the Motor Vehicles (Third Party Risks) Regulations 1972, SI 1972/1217, reg 10: see PARA 740 ante.

UPDATE

755-756 Statutory Alternatives to Insurance

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

755 Security as an alternative to a policy

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 3--For 'Supreme Court' substitute 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(vii) Statutory Alternatives to Insurance/756. Deposit as alternative to policy.

756. Deposit as alternative to policy.

A special exemption from having a policy or security covering compulsorily insurable third party risks exists in the case of a person who deposits £500,000 with the Accountant General of the Supreme Court¹. This was no doubt designed as a convenience for big operators capable of being their own insurers. The relevant rules governing such deposits apply². A deposit pursuant to this exemption, like a deposit made by a person giving a security, forms a special fund which cannot be applied in discharge of any of the depositor's other liabilities as long as any compulsorily insurable liabilities have not been discharged or otherwise provided for³.

1 Road Traffic Act 1988 s 144(1) (amended by the Road Traffic Act 1991 s 20(1), (2)). See also ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 938. The Secretary of State may by order made by statutory instrument substitute a greater sum for the sum for the time being specified; no order may be made unless a draft of it has been laid before and approved by a resolution of each house of Parliament: Road Traffic Act 1988 s 144(1A), (1B) (added by the Road Traffic Act 1991 s 20(3)). As to the Secretary of State see PARA 739 note 3 ante. As to the duty of the owner of a vehicle who has made a deposit to pay for hospital treatment to injured persons see the Road Traffic Act 1988 s 157 (as amended); and PARA 741 ante.

2 See the Motor Vehicles (Third-Party Risks Deposits) Regulations 1992, SI 1992/1284; and PARA 755 ante.

3 Road Traffic Act 1988 s 155(1).

UPDATE

755-756 Statutory Alternatives to Insurance

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

756 Deposit as alternative to policy

TEXT AND NOTE 1--For 'Supreme Court' substitute 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/757. Loopholes in third parties' statutory rights.

(viii) The Motor Insurers' Bureau

757. Loopholes in third parties' statutory rights.

Notwithstanding the stringent provisions originally enacted in the Road Traffic Act 1930 and the Road Traffic Act 1934¹, a substantial gap remained between the theoretical legal right of a third party to be compensated for injuries negligently inflicted by a motorist and the receipt, in practice, of the appropriate compensation. The motorist might well be, and often was, impecunious, so as to make bankruptcy proceedings a barren remedy; the insurers might well be, and often were, immune because the policy had been improperly obtained² or the use of the vehicle was outside the scope of their cover³. Further legislation would, therefore, have been inevitable if steps had not been taken to bridge the gap by an entirely novel piece of extra-statutory machinery in the form of what was called the Motor Insurers' Bureau⁴. The Bureau took the form of a central organisation incorporated at the instance of insurers transacting compulsory motor insurance business in Great Britain. On 17 June 1946 it entered into an agreement with the Minister of Transport as to the provision it would make for cases of injury or death caused by uninsured motor cars. This agreement is commonly called 'the Motor Insurers' Bureau Agreement'. The funds required to fulfil these obligations were made available to the Bureau pursuant to a second agreement, commonly called 'the Domestic Agreement', made between the Bureau and the insurers transacting compulsory motor insurance business in Great Britain. The Domestic Agreement was replaced in 2001 by a fresh agreement known as 'Article 75'⁵.

On 13 August 1999 the Secretary of State and the Bureau entered into an agreement relating to the compensation of victims of uninsured drivers⁶, and on 7 February 2003 an agreement relating to the compensation of victims of untraced drivers⁷. There is no privity of contract between a claimant against the Bureau and the Bureau itself: the agreements take effect between the Secretary of State and the Bureau. However, the untraced drivers agreement does specifically state that the claimant has a cause of action against the Bureau. The terms of the agreements are not overridden by the EC Motor Insurers Directives which they purport to implement; any person who suffers loss by reason of a deficiency in the agreements may nevertheless bring an action against the Secretary of State for failure to implement the directives properly⁸.

1 See PARA 743 ante. Both Acts are now repealed and replaced by the Road Traffic Act 1988.

2 As to the right of insurers to obtain a declaration that they are entitled to avoid a policy see PARA 750 ante.

3 For the principle that the liability of insurers to satisfy a judgment in favour of a third party only applies where the use of the vehicle was within the scope of the policy see PARA 748 ante.

4 The address of the Bureau is Linford Wood House, 6-12 Capital Drive, Linford Wood, Milton Keynes, MK14 6XT.

5 It is so named by reference to article 75 of the articles of association of the Motor Insurers' Bureau. As to the agreement see further PARA 764 post. For the meaning of 'Great Britain' see PARA 8 note 3 ante.

6 See PARA 758 post. The text of the agreement is published by The Stationery Office and is also available on the Bureau's website. It replaces earlier agreements. The Secretary of State who entered into this agreement was the Secretary of State for the Environment, Transport and the Regions; the relevant functions are now

exercised by the Secretary of State for Transport. As to the Secretary of State for Transport see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 509.

7 See PARAS 759-760 post. The text of the agreement is published by The Stationery Office and is also available on the Bureau's website. It replaces earlier agreements. The Secretary of State who entered into this agreement was the Secretary of State for Transport.

8 *Mighell v Reading; Evans v Motor Insurers Bureau; White v White* [1999] PIQR P101, [1999] Lloyd's Rep IR 30, CA; *Evans v Secretary of State for the Environment Transport and the Regions* [2001] EWCA Civ 1598, [2002] Lloyd's Rep IR 1.

UPDATE

757-759 Loopholes in third parties' statutory rights ... Victims of untraced drivers: application of the Agreement

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/758. Victims of uninsured drivers.

758. Victims of uninsured drivers.

The Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement¹ provides that if judgment in respect of any relevant liability² is obtained against any person in any court in Great Britain³, whether or not the person is covered by a contract of insurance⁴, and any such judgment is not satisfied in full within seven days from the date on which the person in whose favour the judgment was given became entitled to enforce it, the Motor Insurers' Bureau will pay⁵ or satisfy, or cause to be paid or satisfied, to or to the satisfaction of the person in whose favour the judgment was given any sum payable or remaining payable in respect of the liability, including amounts payable for interest and the whole of the costs (whether taxed or not) awarded by the court as part of that judgment (or such proportion as is attributable to the liability), whatever may be the cause of the judgment debtor's failure to satisfy the judgment⁶.

The conditions precedent to the Bureau's acceptance of liability under the agreement are:

- 204 (1) an application is made in such form, giving such information about the proceedings and other matters relevant to the agreement, and accompanied by such documents as the Bureau may reasonably require⁷;
- 205 (2) notice in writing of the bringing of the proceedings⁸ must be given within 14 days after the commencement of the proceedings⁹ (a) to the insurer, in the case of proceedings in respect of a liability which is covered by a contract of insurance with an insurer whose identity can be ascertained¹⁰; or (b) in any other case to the Bureau¹¹;
- 206 (3) the claimant must have demanded, as soon as reasonably practicable, the statutory information as to insurance or security¹² or, if required by the Bureau, have authorised the Bureau to do so on his behalf¹³;
- 207 (4) the claimant must give notice in writing¹⁴ within seven days of the date of service of the claim form or other originating process in the proceedings¹⁵, the filing of a defence, any amendment to the particulars of claim or any document served therewith, and either the setting down of the case for trial, or the date of receipt of notice from the court of the trial date¹⁶; the claimant must also give notice in writing not less than 35 days before the date when he intends to apply for or to sign judgment in the proceedings¹⁷;
- 208 (5) if so required by the Bureau and subject to full indemnity by it as to costs, the claimant must take all reasonable steps to obtain judgment against every person who may be liable (including any person who may be vicariously liable) in respect of the injury, death or damage to property, and must consent, if requested by the Bureau to do so, to the Bureau being joined as a party to the proceedings¹⁸; and
- 209 (6) the claimant must assign the judgment and any order for costs to the Bureau or its nominee and must give an undertaking to the Bureau to repay any sum paid to him by the Bureau if the judgment is subsequently set aside in whole or in part, or the claimant receives any compensation or benefit for the death, bodily injury or other damage to which the proceedings relate from any other person¹⁹.

The agreement may be determined by the Secretary of State or by the Bureau on 12 months' notice, without prejudice to its continued operation in respect of accidents occurring before the date of termination²⁰.

Nothing in the agreement prevents insurers²¹ from providing by conditions in their contracts of insurance that all sums paid by them or by the Bureau in or towards the discharge of the liability of their insured are recoverable by them or by the Bureau from the insured or from any other person²².

The Bureau is under no liability where:

- 210 (i) the claim arises out of the use of a vehicle owned by or in possession of the Crown²³;
 - 211 (ii) the claim arises out of the use of a vehicle which is not required to be covered by a contract of insurance²⁴ unless the use is, in fact, covered by such a contract²⁵;
 - 212 (iii) the claim is by, or for the benefit of, a person (the beneficiary) other than the person suffering death, injury or other damage and is made either where a cause of action or a judgment has been assigned to the beneficiary or pursuant to a right of subrogation or contractual or other right belonging to the beneficiary²⁶;
 - 213 (iv) the claim is in respect of damage to a motor vehicle or losses arising from it if at the time when the damage to it was sustained there was not in force a policy of insurance, and the claimant either knew or ought to have known that that was the case²⁷; or
 - 214 (v) the claim relates to a liability incurred by the owner, registered keeper or a person using the vehicle²⁸ in which the claimant was being carried²⁹, and is made by a claimant who, at the time of the use giving rise to the relevant liability, was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that:
- 9
- 6. (A) the vehicle had been stolen or unlawfully taken;
 - 7. (B) the vehicle was being used without there being in force in relation to its use a contract of insurance;
 - 8. (C) the vehicle was being used in the course or furtherance of a crime; or
 - 9. (D) the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension³⁰.
- 10

1 As to the agreement see PARA 757 ante. The agreement operates in relation to claims arising out of accidents occurring on and after 1 October 1999.

2 'Relevant liability' means a liability in respect of which a contract of insurance must be in force to comply with the Road Traffic Act 1988 Pt VI (ss 143-162) (as amended) (see PARA 729 et seq ante): Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 1. 'Relevant liability' does not include the liability of an owner to a permitted driver where the latter is injured while using the vehicle: *Cooper v Motor Insurers' Bureau* [1985] QB 575, [1985] 1 All ER 449, CA. An interim payment order is a judgment for the purposes of the agreement: *Sharp v Pereria* [1998] 4 All ER 145, [1999] 1 WLR 195, CA.

3 For the meaning of 'Great Britain' see PARA 8 note 3 ante.

4 'Contract of insurance' means a policy of insurance or a security covering a relevant liability: Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 1.

5 le subject to *ibid* cll 6-17 (see the text and notes 7-19, 23-30 *infra*): cl 5(1).

6 *Ibid* cl 5(1), (2). Where a claim includes a claim in respect of damage to property the Bureau's liability is limited to £250,000 subject to there being no liability in respect of the first £300 of the claim or such other sum as may be agreed in writing between the Secretary of State and the Bureau: cl 16. Where a claimant has received compensation from an insurer under an insurance agreement or arrangement, or any other source, in respect of the death, bodily injury or other damage the Bureau may deduct from the payment to be made by it an amount equal to that compensation: cl 17. Where any act or thing is done to or by, any decision is made by

or in respect of, or any sum is paid to a solicitor or other person acting on behalf of a claimant, then whatever may be the age or other circumstances affecting the capacity of the claimant, that act, thing, decision or sum must be treated as if it had been done to or by, or made in respect of or paid to a claimant of full age and capacity: cl 3.

7 Ibid cl 7(1). An application may be signed by the claimant, his solicitor or someone on his behalf. In the latter case the Bureau may refuse to accept the application (and will incur no liability) until it is reasonably satisfied that, having regard to the status of the signatory and his relationship to the claimant, the claimant is fully aware of the contents and effect of the application: cl 7(2). Any dispute as to the reasonableness of a requirement made by the Bureau for the supply of information or documentation or for the taking of any step by the claimant, may be referred by the claimant or the Bureau to the Secretary of State, whose decision is final: cl 19. As to the Secretary of State see PARA 757 note 7 ante.

8 The notice must be accompanied by a copy of the sealed claim form, writ or other official document providing evidence of the commencement of the proceedings; a copy or details of any insurance policy; copies of all correspondence in the claimant's possession which is relevant to the claim; a copy of the particulars of claim whether or not served on any defendant; a copy of all other documents which are required under the appropriate rules of procedure to be served on a defendant with the claim form, writ or other originating process or with the particulars of claim; and such other information about the proceedings as the Bureau may reasonably specify: *ibid* cl 9(2)(a)-(g). As to the adequacy of the information provided see *Cambridge v Motor Insurers Bureau* [1998] RTR 365, CA; see also note 7 supra. In the case of proceedings where the particulars of claim have not been served with the claim form or other originating process a copy must be served on the Bureau not later than seven days after it is served on the defendant: Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 9(3). As to the commencement of proceedings and their conduct generally see CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq. Where a claimant has made an application in accordance with cl 7 (see note 7 supra) and has given notice of the relevant proceedings in accordance with cl 9.2, the Bureau must give a reasoned reply to any request made by the claimant relating to the payment of compensation by the Bureau and as soon as reasonably practicable notify the claimant in writing of its decision regarding the payment of the compensation together with the reasons for that decision: cl 18.

9 Commencement of proceedings means the point in time at which under the rules of the relevant court the proceedings commenced; it is not postponed until the plaintiff knows of the commencement: *Silverton v Goodall* [1997] PIQR P 451, CA.

10 Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 9(1)(a).

11 Ibid cl 9(1)(b).

12 *Ie* under the Road Traffic Act 1988 s 154 (see PARA 753 ante): Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 13(a). If the person of whom the demand is made fails to comply with the demand the claimant must have made a formal complaint to a police officer in respect of that failure, and used all reasonable endeavours to obtain the name and address of the registered keeper of the vehicle: cl 13(b).

13 Ibid cl 13.

14 As to the persons to whom notice is to be given see the text and notes 10, 11 supra.

15 Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 10(1), (2), (3). Alternatively notice must be given within 14 days after the date when service is deemed to have occurred in accordance with the Civil Procedure Rules, should this occur first: Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 10(3)(b). As to the service of proceedings see CIVIL PROCEDURE.

16 Ibid cl 11(1). The claimant must also provide within a reasonable time after being required to do so such further information and documents in support of his claim as the Bureau may reasonably require: cl 11(2); and see note 7 supra.

17 Ibid cl 12(1), (2). As to applications for judgment see CIVIL PROCEDURE vol 12 (2009) PARA 1136 et seq.

18 Ibid cl 14. See *Norman v Ali*; *Norman v Aziz* [2000] RTR 107, [2000] Lloyd's Rep IR 395, CA (no reasonableness limitation on the Bureau in making such a request).

19 Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 15. Where a judgment which includes an amount in respect of a liability, other than a relevant liability, has been assigned to the Bureau or its nominee, the Bureau must apportion any money received in pursuance of the judgment according to the proportion which the damages in respect of the relevant liability bear to the damages in respect of the other liabilities and must account to the claimant in respect of such money received properly

apportionable to the other liabilities; and where an order for costs in respect of such a judgment has been so assigned, money received pursuant to the order must be dealt with in the same manner: cl 21.

20 Ibid cl 4(2).

21 'Insurer' includes the giver of a security (see PARA 755 ante): *ibid* cl 1.

22 Ibid cl 20.

23 Ie except where another person has undertaken responsibility for a contract of insurance under the Road Traffic Act 1988 Pt VI (as amended) (whether or not the persons liable are covered), or where liability is, in fact, covered by a contract of insurance: Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 6(1)(a). A vehicle which has been unlawfully removed from the possession of the Crown must be taken to continue in that possession whilst it is kept so removed: cl 6(5)(a).

24 Ie under the Road Traffic Act 1988 s 144 (as amended) (see PARA 729 ante): Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 6(1)(b).

25 Ibid cl 6(1)(b).

26 Ibid cl 6(1)(c).

27 Ibid cl 6(1)(d). As to the burden of proving that the claimant knew or ought to have known of any matter see note 30 *infra*.

28 As to who may be a person using the vehicle see: *Stinton v Stinton* [1995] RTR 167, [1995] 01 LS Gaz R 37, sub nom *Stinton v Motor Insurers Bureau* 159 JP 656, [1999] Lloyd's Rep IR 305, CA; *Hatton v Hall* [1997] RTR 212, [1999] Lloyd's Rep IR 313, CA; *O'Mahoney v Joliffe* [1999] RTR 245, 163 JP 800, CA.

29 References to a person being carried in a vehicle include references to his being carried upon, entering, getting on to and alighting from the vehicle: Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 6(5)(b).

30 Ibid cl 6(1)(e), (2). The burden of proving that the claimant knew or ought to have known of any matter is on the Bureau but, in the absence of evidence to the contrary, proof by the Bureau of any of the following matters will be taken as proof of the claimant's knowledge:

38 (1) that the claimant was the owner or registered keeper of the vehicle or had caused or permitted its use;

39 (2) that the claimant knew the vehicle was being used by a person who was below the minimum age at which he could be granted a licence authorising the driving of a vehicle of that class;

40 (3) that the claimant knew that the person driving the vehicle was disqualified for holding or obtaining a driving licence;

41 (4) that the claimant knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle: cl 6(3).

Knowledge which the claimant has or ought to have includes knowledge of matters which he could reasonably be expected to have been aware of had he not been under the self-induced influence of drink or drugs: cl 6(4). 'Owner', in relation to a vehicle which is the subject of a hiring agreement or a hire-purchase agreement, means the person in possession of the vehicle under that agreement: cl 6(5)(c). As to the degree of knowledge required see: *White v White* [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481; *Akers v Thorne* [2003] All ER (D) 16 (Jan), CA.

UPDATE

757-759 Loopholes in third parties' statutory rights ... Victims of untraced drivers: application of the Agreement

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning

of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

758 Victims of uninsured drivers

NOTE 24--Where a passenger is involved in a road traffic accident, compulsory insurance cover liability for personal injuries is available to all passengers, whether or not the vehicle is designed or constructed with seating accommodation for passengers: Case C-356/05 *Farrell v Whitty* [2007] 2 CMLR 1250, [2007] Lloyd's Rep IR 525, ECJ.

NOTE 30--As to what constitutes withdrawal of consent to be carried in the vehicle see *Pickett v Roberts* [2004] EWCA Civ 6, [2004] 2 All ER 685. Reference to the knowledge of the claimant can only be interpreted to include that known or that which ought to have been known by the person who commenced the proceedings: *Phillips v Rafiq* [2007] EWCA Civ 74, [2007] 3 All ER 382, [2007] 1 WLR 1351.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/759. Victims of untraced drivers: application of the Agreement.

759. Victims of untraced drivers: application of the Agreement.

The Motor Insurer's Bureau (Compensation of Victims of Untraced Drivers) Agreement¹ applies where an application is made to the Motor Insurers' Bureau for an award in respect of the death of, or bodily injury to, a person or damage to any property caused by or arising out of the use of a motor vehicle on a road or other public place in Great Britain² and:

- 215 (1) the event giving rise to the death, bodily injury or damage to property occurred on or after 14 February 2003³;
- 216 (2) the death, bodily injury or damage to property occurred in circumstances giving rise to liability of a kind which is required to be covered by a policy of insurance or a security⁴;
- 217 (3) it is not possible for the applicant to identify the person who is, or appears to be, liable in respect of the death, injury or damage, or, where more than one person is or appears to be liable, to identify any one or more of those persons⁵;
- 218 (4) the application⁶ must have been made not later than three years after the date of the event giving rise to the death or bodily injury (whether or not damage to property has also arisen from the same event)⁷, or nine months after the date of the event in the case of a claim for compensation for damage to property (whether or not death or bodily injury has also arisen from the same event)⁸;
- 219 (5) the applicant, or a person acting on his behalf, must have reported the event giving rise to the claim to the police not later than 14 days after its occurrence in the case of an event causing a death or bodily injury alone, and not later than 5 days after its occurrence in the case of an event causing property damage (whether or not a death or bodily injury has also arisen from it); where reporting within these time limits is not reasonably possible the event must have been reported as soon as reasonably possible⁹.

The Bureau is under no liability¹⁰ where:

- 220 (a) the applicant makes no claim for compensation in respect of death or bodily injury and the damage to property in respect of which compensation is claimed has been caused by, or has arisen out of, the use of an unidentified vehicle¹¹;
- 221 (b) the claim arises out of the use of a vehicle owned by or in the possession of the Crown¹²;
- 222 (c) at the time of the event in respect of which the application is made the person suffering death, injury or damage to property was voluntarily allowing himself to be carried in¹³ the responsible vehicle¹⁴ and before the commencement of his journey in the vehicle, or after commencement if he could reasonably be expected to have alighted from the vehicle, he knew or ought to have known¹⁵ that the vehicle:

11

- 10. (i) had been stolen or unlawfully taken; or
- 11. (ii) was being used without there being in force in relation to its use a contract of insurance or security complying with the Road Traffic Act 1988; or
- 12. (iii) was being used in the course or furtherance of crime¹⁶; or

13. (iv) was being used as a means of escape from or avoidance of lawful apprehension¹⁷;
- 12
- 223 (d) the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism¹⁸;
 - 224 (e) the property damaged as a result of the event giving rise to the application is insured against such damage and the applicant has recovered the full amount of his loss from the insurer on or before the date of the application¹⁹;
 - 225 (f) the claim is made for compensation in respect of damage to a motor vehicle, or losses arising therefrom, and:
- 13
14. (i) at the time when the damage to it was sustained there was not in force in relation to the use of that vehicle such a contract of insurance as is required by Part VI of the Road Traffic Act 1988; and
 15. (ii) the person suffering damage to property either knew or ought to have known that was the case²⁰;
- 14
- 226 (g) the application is made neither by a person suffering injury or property damage, nor by the personal representative of such a person, nor by a dependant²¹ claiming in respect of the death of another person but is made where a cause of action or a judgment has been assigned to the applicant, or where the applicant is acting pursuant to a right of subrogation or a similar contractual or other right²².

1 As to the agreement see PARA 757 ante. The agreement came into force on 14 February 2003 but the agreement dated 14 June 1996 (which is available on the Bureau's website) continues to operate in relation to any claim arising out of an event occurring on or before 13 February 2003: Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 3(1), 33. The agreement may be determined by the Secretary of State or the Bureau giving the other not less than 12 months' notice in writing: cl 3(2). Notwithstanding termination the agreement will continue to operate in respect of any case where the event giving rise to the claim occurred before the date of termination: cl 3(3). As to the Secretary of State see PARA 757 note 7 ante.

2 Ibid cl 4(1)(a), (e). Where both death or bodily injury and damage to property have arisen from a single event an applicant need not make an application in respect of the death or bodily injury on the same occasion as an application in respect of the damage to property. Where two applications are made in respect of one event the provisions of the agreement apply separately to each application: cl 4(4). For the meaning of 'Great Britain' see PARA 8 note 3 ante.

3 Ibid cl 4(1)(b); and see note 1 supra. As to the deficiencies in the earlier agreement see *Evans v Secretary of State for the Environment Transport and the Regions* [2001] EWCA Civ 1598, [2002] Lloyd's Rep IR 1.

4 Ie under the Road Traffic Act 1988 Pt VI (ss 143-162) (as amended) (see PARA 729 et seq ante): Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 4(1)(c). As to security see PARA 755 ante.

5 Ibid cl 4(1)(d).

6 The Bureau may not refuse to accept an application because it is signed by a person other than the applicant or his solicitor. However, where an application is signed by a person who is neither the applicant nor his solicitor the Bureau may refuse to accept the application (and will incur no liability under the agreement) until it is reasonably satisfied that, having regard to the status of the signatory and his relationship with the applicant, the applicant is fully aware of the content and effect of the application: *ibid* cl 4(2).

7 Ibid cl 4(1)(f), (3)(a)(i).

8 Ibid cl 4(1)(f), (3)(a)(ii). In a case where the applicant could not reasonably have been expected to have become aware of the existence of bodily injury or damage to property, the application must have been made as soon as practicable after he did become, or ought reasonably to have become, aware of it and in any case not later than 15 years after the date of the event which is the subject of the application in the case of a claim for compensation for death or bodily injury, or 2 years after the date of that event in the case of a claim for compensation for damage to property: cl 4(3)(b).

9 Ibid cl 4(3)(c). The applicant must produce an acknowledgement from the police showing the crime or incident number under which the matter has been recorded (cl 4(3)(d)); and after making, or authorising the making of, a report to the police must have co-operated with the police in any investigation they have made into the event (cl 4(3)(e)).

10 Where an application is made partly in the circumstances listed in the text and partly in other circumstances, the agreement applies only to the part made in those other circumstances: ibid cl 5(1).

11 Ibid cl 5(1)(a). Where the application includes a claim for compensation both in respect of death or bodily injury and also in respect of damage to property, and the death or injury and the property damage has been caused by, or has arisen out of, the use of an unidentified vehicle, the Bureau is not liable in respect of the damage to property: cl 5(3).

12 Ie unless at the time of the event giving rise to the claim some other person had undertaken responsibility for bringing into existence a policy of insurance or security satisfying the requirements of the Road Traffic Act 1988 Pt VI (as amended): Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 5(1)(b).

13 References to a person being carried in a vehicle include references to his being carried in or upon, or entering or getting on to or alighting from the vehicle: ibid cl 5(4)(a).

14 'Responsible vehicle' means the vehicle the use of which caused, or through the use of which there arose, the death, bodily injury or damage to property which is the subject of the application: ibid cl 5(4)(d).

15 The knowledge which a person has or ought to have includes knowledge of matters which he could reasonably be expected to have been aware of had he not been under the self-induced influence of drink or drugs: ibid cl 5(4)(b). The burden of proving that the person suffering death, injury or damage to property knew or ought to have known of any matter is on the Bureau. In the absence of evidence to the contrary, proof by the Bureau that (1) he was the owner or registered keeper of the vehicle or had caused or permitted its use; (2) he knew the vehicle was being used by a person who was below the minimum age at which he could be granted a licence authorising the driving of a vehicle of that class; (3) he knew that the person driving the vehicle was disqualified for holding or obtaining a driving licence; (4) he knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle must be taken as proof of his knowledge: cl 5(2).

16 'Crime' does not include the commission of an offence under the Road Traffic Regulation Act 1984, the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988 (the Traffic Acts) except an offence under the Road Traffic Act 1988 s 143 (use of a motor vehicle on a road without there being in force a policy of insurance) (see PARA 729 ante): Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 5(4)(c). As to offences under the Traffic Acts see ROAD TRAFFIC.

17 Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 5(1)(c).

18 Ibid cl 5(1)(d). 'Terrorism' has the meaning given in the Terrorism Act 2000 s 1: Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 5(4)(e); see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 383.

19 Ibid cl 5(1)(e). This is without prejudice to the application of the agreement in the case of any other claim for compensation made in respect of the same event.

20 Ibid cl 5(1)(f). This is without prejudice to the application of the agreement in the case of any other claim for compensation made in respect of the same event. As to the knowledge a person has or ought to have see note 15 supra.

21 'Dependant' has the same meaning as in the Fatal Accidents Act 1976 s 1(3): Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 5(4)(f); see NEGLIGENCE vol 78 (2010) PARAS 25-28.

22 Ibid cl 5(1)(g). As to subrogation see PARA 196 ante.

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757-759 Loopholes in third parties' statutory rights ... Victims of untraced drivers: application of the Agreement

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning

of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

759 Victims of untraced drivers: application of the Agreement

NOTE 7--In its failure to replicate the Limitation Act 1980 s 28 (see LIMITATION PERIODS vol 68 (2008) PARA 1171) the Agreement fails to meet its intended role of implementing EC Council Directive 84/5 so as to give equivalent protection to the victims of non-insured and untraced drivers: *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574, [2008] 4 All ER 476.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/760. Victims of untraced drivers: awards under the Agreement.

760. Victims of untraced drivers: awards under the Agreement.

When making an award, the Motor Insurers' Bureau, in calculating the sum payable by way of compensation for the death, bodily injury or damage to property, must adopt the same method of calculation as a court would adopt in calculating damages¹.

The conditions precedent to the Bureau's liability are:

- 227 (1) the applicant must make his application in such form, provide such statements and other information (whether in writing or orally at interview) in support of the application, and give such further assistance as may reasonably be required by the Bureau to enable an investigation of the claim to be carried out²;
- 228 (2) the applicant must provide the Bureau with written authority to take all such steps as may be reasonably necessary in order to carry out a proper investigation of the claim³ and, if the Bureau reasonably requires him to do so before reaching a decision on the claim, make a statutory declaration setting out to the best of his knowledge and belief all the facts and circumstances upon which his application is based, or such facts and circumstances in relation to the application as the Bureau may reasonably specify⁴;
- 229 (3) the applicant must, if the Bureau reasonably requires him to do so before it reaches a decision on the claim and subject to it indemnifying him against all reasonable costs and expenses⁵, either bring proceedings against any person or persons who may, in addition or alternatively to the unidentified person, be liable to the applicant in respect of the death, bodily injury or damage to property⁶, and co-operate with the Bureau in taking the steps necessary to obtain judgment in those proceedings⁷, or authorise the Bureau to bring the proceedings and take those steps in the applicant's name⁸;
- 230 (4) the applicant must assign to the Bureau or to its nominee the benefit of any judgment obtained by him, whether in proceedings brought at the request of the Bureau or other proceedings⁹;
- 231 (5) the applicant must undertake to assign to the Bureau the right to any sum which is or may be due from an insurer, security giver or other person by way of compensation for, or benefit in respect of, the death, bodily injury or damage to property and which would, if payment had been made before the date of the award, have excluded or limited the Bureau's liability¹⁰.

The Bureau must, at its own cost, take all reasonable steps to investigate the application. If it is satisfied after conducting a preliminary investigation that the application should be rejected, it must inform the applicant accordingly and need take no further action¹¹. In any other case, it must conduct a full investigation and, as soon as reasonably practicable, make a report on the applicant's claim¹². On the basis of the report and, where applicable any relevant proceedings, the Bureau must reach a decision as to whether it must make an award to the applicant and the amount of that award¹³. The Bureau is under an obligation to make an award only if it is satisfied, on the balance of probabilities, that the unidentified person would, had he been identified, have been held liable to pay damages to the applicant in respect of the claim¹⁴.

The Bureau must give the applicant notice of its decision or determination and in every case a statement of its reasons for making the decision or determination¹⁵. The Bureau must make an

interim award as soon as reasonably practicable after the interim report to which the award relates¹⁶. In the case of a full and final award, on being notified by the applicant that the Bureau's award is accepted, or after the expiration of the time allowed for lodging an appeal, the Bureau must pay him the amount of the award within 14 days¹⁷.

Where an applicant is not willing to accept a decision or determination of his claim made by the Bureau, a proposal for a structured settlement or a rejection of his request for a provisional award, he may appeal to an arbitrator¹⁸. The applicant must give the Bureau notice of appeal within six weeks from the date of notice of its decision¹⁹. If the only ground of appeal is that the award is insufficient, the Bureau may notify the applicant that, if the appeal proceeds, it will ask the arbitrator to decide whether the award exceeds what a court would have awarded or whether it would make an award at all, and it must send the applicant any observations it considers relevant to the arbitrator's decision²⁰.

On receiving notification from the Secretary of State of the appointment of an arbitrator the Bureau must send to the arbitrator the notice of appeal, the application, the decision and all other documents given or sent under the agreement²¹. The arbitrator may require the Bureau to make a further investigation for the purpose of resolving any issue and send to him and the applicant copies of its report²². The applicant may submit comments on the report to the arbitrator and the Bureau within four weeks²³.

After considering the documents submitted the arbitrator must send to the applicant and the Bureau a preliminary decision letter setting out the decision he proposes to make and his reasons for doing so²⁴. The applicant and the Bureau may notify the arbitrator in writing within 28 days of the sending of the preliminary decision letter of their acceptance of the preliminary decision; or may submit written observations upon it or the reasons or both; or may request an oral hearing²⁵. If both the applicant and the Bureau accept the preliminary decision that decision becomes the final decision, but if either of them submits observations the arbitrator must take those observations into account before making a final decision²⁶. If the applicant or the Bureau requests an oral hearing, the arbitrator must determine the appeal in that manner²⁷.

The arbitrator must notify the Bureau and the applicant of his decision in writing²⁸. The arbitrator may in an appropriate case:

- 232 (a) determine whether or not the case is one to which the Agreement applies;
- 233 (b) remit the application to the Bureau for a full investigation and a decision in accordance with the provisions of the Agreement;
- 234 (c) determine whether the Bureau should make an award and if so what that award should be;
- 235 (d) determine such other questions as have been referred to him as he thinks fit;
- 236 (e) order that the costs of the proceedings be paid by one party or allocated between the parties in such proportions as he thinks fit²⁹.

Any award must be paid by the Bureau and discharges the Bureau's liability under the agreement³⁰. If the Bureau fails to pay compensation in accordance with the provisions of the agreement the applicant is entitled to enforce payment through the courts³¹.

1 Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 8(1), (2). In an appropriate case the Bureau must also award interest on the compensation payable at a rate equal to that which a court would have awarded it: cl 9(1). The Bureau must also make a contribution, to be calculated in accordance with the Schedule to the agreement, towards the cost of obtaining legal advice in respect of the making of an application, the correctness of any decision made by the Bureau, or the adequacy of an award: cl 10(1). The Bureau does not need to calculate the exact proportion of the award which represents compensation, interest or legal costs: cl 7(7). As to the assessment of damages see DAMAGES vol 12(1) (Reissue) PARA 826 et seq.

The Bureau is under no obligation to include in its award an amount in respect of loss of earnings where the applicant has been paid wages or salary, or any sum in lieu of them, whether or not those payments were made

subject to an agreement or undertaking on his part to repay them in the event of his recovering damages for the loss of those earnings: cl 8(2). Where an application includes a claim in respect of damage to property, the Bureau's liability is limited as follows: (1) if the loss incurred by an applicant in respect of any one event giving rise to a claim does not exceed £300 the Bureau incurs no liability to that applicant in respect of that event (cl 8(3)(a)); (2) if the aggregate of all losses incurred by the applicant and other persons in respect of any one event giving rise to a claim ('the total loss') exceeds £300 but does not exceed £250,000 the Bureau's liability to an individual applicant is the amount of the claim less £300 and its total liability to applicants in respect of claims arising from that event is the total loss less a sum equal to £300 multiplied by the number of applicants (cl 8(3)(b)); (3) if the total loss exceeds £250,000 the Bureau's liability to an individual applicant will not exceed the amount of the claim less £300, and its total liability to applicants in respect of claims arising from that event is £250,000 less a sum equal to £300 multiplied by the number of applicants (cl 8(3)(c)).

2 Ibid cl 11(1). As to the investigation of claims see text and notes 11-14 infra.

3 Ibid cl 11(2).

4 Ibid cl 11(3).

5 Ibid cl 11(5).

6 Ie by virtue of having caused or contributed to the death, injury or damage, by being vicariously liable in respect of it or having failed to effect third party liability insurance in respect of the vehicle in question: ibid cl 11(4)(a)(i).

7 Ibid cl 11(4)(a)(i). Where the death, bodily injury or damage to property is caused, or appears on the balance of probabilities to have been caused (1) partly by an unidentified person and partly by an identified person; or (2) partly by an unidentified person and partly by another unidentified person whose employer or principal is identified, the Bureau's liability is limited to the unidentified person's liability: cl 13(1), (2). The Bureau is under no liability under the agreement if the applicant is able to recover against the identified person under the Uninsured Drivers Agreement (see PARA 758 ante): Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 15.

8 Ibid cl 11(4)(a)(iii). The applicant must, at the Bureau's expense, provide it with a transcript of any official shorthand or recorded note taken of any evidence given or judgment delivered in the proceedings: cl 11(4)(b). Where the applicant has commenced proceedings without having been required to do so by the Bureau he must, as soon as reasonably possible, notify the Bureau of those proceedings and provide it with such further information about them as the Bureau may reasonably require: cl 11(6).

9 Ibid cl 11(4)(c).

10 Ibid cl 11(4)(d). As to the effect of compensation on the liability of the Bureau see note 14 infra.

11 Ibid cl 7(1)(a). If after making a preliminary investigation the Bureau decides that the case is one to which the agreement applies (and does not involve partial liability on the part of an identified person, his employer or principal) it may, instead of causing a full investigation, make an offer to settle the claim by payment of a specified amount: cl 26(1). The offer is to be accompanied by a statement setting out the relevant evidence and the Bureau's reasons for the assessment of the award: cl 26(2). The applicant must notify the Bureau of his acceptance or rejection of the offer within 6 weeks after he receives it: cl 27(1). If he accepts the offer the Bureau must pay the award within 14 days and is discharged from its liability: cl 27(2). If the applicant fails to accept the offer within 6 weeks the Bureau is required to make a full investigation of the claim: cl 27(3); and see the text and notes 12-14 infra.

12 Ibid cl 7(1)(b).

13 Ibid cl 7(2)(a), (b). Where the Bureau decides that it is able to calculate the whole amount of the award the report is a full report and the award is a full and final award: cl 7(3), (5). Where it decides that it is not at that time able to calculate the final amount of the award (or a part thereof), it may designate the report as an interim report. Where it does so it may make one or more further interim reports, but must, as soon as reasonably practicable, make a final report: cl 7(4). Where it makes an interim report the Bureau must determine the amount of any interim award it wishes to make: cl 7(5). As to the Bureau's duty under cl 7 see *Persson v London Country Buses* [1974] 1 All ER 1251, [1974] 1 WLR 569, CA.

14 Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement cl 7(6). Where an applicant receives compensation or other payment in respect of the claim from an insurer or under an insurance policy (other than a life assurance policy) or arrangement between the applicant or his employer and the insurer, a person who has given a security, or any other source (other than an identified person partially responsible for the injury, death or damage to property), the amount of the award is reduced by that payment: cl 6.

15 Ibid cl 16(a), (f). The applicant must be told the amount of any award and provided with a copy of any interim or final report, and where the application has been fully investigated all the evidence obtained during the investigation and the Bureau's findings of fact from that evidence relevant to the decision: cl 16(b)-(d).

16 Ibid cl 17(1)(a).

17 Ibid cl 17(1)(b)(i), (ii). Payment discharges the Bureau from all liability in respect of the death, bodily injury or damage to property for which the award is made: cl 17(1). The Bureau may offer a 'structured settlement', being the payment of the award in instalments in accordance with a structure described in the decision letter: cl 17(2). Where an applicant has suffered bodily injury and believes either (1) that there is a risk that he will develop a disease or condition other than that in respect of which he has made a claim; or (2) that a disease or condition in respect of which he has made a claim will deteriorate, he may notify the Bureau that he wishes it to make a provisional award: cl 17(3). The Bureau must accept or reject the notice within 14 days of receiving it: cl 17(5). Where the Bureau accepts the notice the applicant may make a supplementary application in respect of a disease or type of deterioration of his condition as specified in his notice and within the period specified in his notice: cl 17(6). The Bureau may establish a trust of the whole or part of the award (to be administered by the Family Welfare Association, or a similar body or person, or the Court of Protection) if it considers it to be in the applicant's interest by reason of his being a minor or of any other circumstance affecting his capacity to manage his affairs: cl 25.

18 Ibid cl 18. The arbitrator is selected by the Secretary of State from a panel of Queen's Counsel appointed by the Lord Chancellor: cl 21. As to the arbitrator's fees see cl 24. As to the Secretary of State see PARA 757 note 7 ante. Any dispute between the applicant and the Bureau concerning any other decision, determination or requirement made by the Bureau is to be referred to and determined by an arbitrator in accordance with cl 28 of the Agreement: cl 28(1).

19 Ibid cl 19(1). The notice of appeal must state the grounds on which the appeal is made, contain the applicant's observations on the Bureau's decision, may be accompanied by such further evidence in support of the appeal as the applicant thinks fit, and contain an undertaking that the applicant will abide by the decision of the arbitrator: cl 19(2). Not later than 7 days after receiving the notice of appeal the Bureau must (1) apply to the Secretary of State for the appointment of an arbitrator; or (2) notify the applicant of its intention to investigate any further evidence supplied by the applicant and report to the applicant upon that investigation and of any change in its decision as a result: cl 20(1). The applicant must within 6 weeks of receipt of the report notify the Bureau whether he wishes to withdraw or to proceed with the appeal: cl 20(3). When applying to the Secretary of State for the appointment of an arbitrator the Bureau may send any written observations it wishes to make upon the applicant's notice of appeal, at the same time sending a copy to the applicant: cl 20(7).

20 Ibid cl 20(2). The applicant must within 6 weeks of receipt of the notice notify the Bureau whether he wishes to withdraw or to proceed with the appeal: cl 20(3).

21 Ibid cl 22(1).

22 Ibid cl 22(2)(a).

23 Ibid cl 22(2)(b).

24 Ibid cl 22(3).

25 Ibid cl 22(4)(a)-(c). If either of them should within that period fail to do any of those things he or it is to be treated as having accepted the decision: cl 22(4). If the applicant submits new evidence with any written observations the Bureau may within 28 days make an investigation into that evidence, submit its own written observations on it and, if it has not already done so, request an oral hearing: cl 22(5).

26 Ibid cl 22(6).

27 Ibid cl 22(7).

28 Ibid cl 23(2).

29 Ibid cl 23(1). Where an oral hearing has taken place at the request of the applicant and the arbitrator is satisfied that it was unnecessary and that the matter could have been decided on the basis of written submissions he must take that into account when making an order for costs: cl 23(4). Where there is an oral hearing and the applicant secures an award of compensation greater than that previously offered, then (unless the arbitrator orders otherwise) the Bureau must make a contribution of £500 per half day towards the cost incurred by the applicant in respect of legal representation: cl 24(4). Where it appears to the arbitrator that there were no reasonable grounds for making the appeal he may order the applicant or where he considers it appropriate his solicitor or other person acting on his behalf to reimburse the Bureau the fee it has paid to the

arbitrator or any part thereof: cl 24(2). In the event of such an order the Bureau may deduct the amount of the fee from any amount which it pays to the applicant or to the solicitor or other person to discharge its liability to the applicant: cl 24(3).

30 Ibid cl 23(3).

31 Ibid cl 32.

UPDATE

760 Victims of untraced drivers: awards under the Agreement

NOTES--The European Court of Justice has considered questions relating to the nature of the award of compensation: Case C-63/01 *Evans v Secretary of State for the Environment Transport and the Regions* [2005] All ER (EC) 763, ECJ.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/761. Liability in respect of intentional criminal act.

761. Liability in respect of intentional criminal act.

The Motor Insurers' Bureau is liable under the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement¹ to a third party injured by an uninsured driver even though that driver intentionally causes the injury². The doctrine of public policy that a person is not entitled to profit from his own wrongdoing does not apply, since the satisfaction of the uninsured driver's liability to the third party is incidental to the main purpose of the agreement, which is the protection of an innocent third party³.

1 As to the Bureau see PARA 757 ante; and as to the agreement see PARA 758 ante.

2 *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA (where the claimant, a security officer, stopped a van and questioned the driver, who drove off at speed while the claimant was holding on to the door; the claimant was held entitled to recover against the Bureau); *Gardner v Moore* [1984] AC 548, [1984] 1 All ER 1100, HL.

3 *Gardner v Moore* [1984] AC 548, [1984] 1 All ER 1100, HL; *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/762. Effect of Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement on the general law.

762. Effect of Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement on the general law.

The Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement¹ applies to cases where there is no insurance in operation at all. The fact, however, that motor insurers have established this extra-statutory means of providing compensation to victims of motor accidents does not in any way relieve a person who uses, or permits to be used, a car while uninsured from his personal liability for this breach of statutory duty². On questions of costs, however, it is relevant for the court to take into account that in fact the Bureau is defending a case, even though the defendant on the record is the uninsured motorist and has a legal aid certificate³. In practice, the Bureau may be sued direct in appropriate cases⁴.

1 As to the agreement see PARA 758 ante.

2 *Corfield v Groves* [1950] 1 All ER 488.

3 *Godfrey v Smith* [1955] 2 All ER 520, [1955] 1 WLR 692.

4 *Lees v Motor Insurers' Bureau* [1952] 2 All ER 511 (on appeal [1953] 1 WLR 620, CA); *Buchanan v Motor Insurers' Bureau* [1955] 1 All ER 607, [1955] 1 WLR 488; *Coward v Motor Insurers' Bureau* [1963] 1 QB 259, [1962] 1 All ER 531, CA; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA; *Randall v Motor Insurers' Bureau* [1969] 1 All ER 21, [1968] 1 WLR 1900; *Motor Insurers' Bureau v Meanen* [1971] 2 All ER 1372n, HL; *Albert v Motor Insurers' Bureau* [1972] AC 301, [1971] 2 All ER 1345, HL. The Bureau would never take the point that the third party was not privy to the agreements: *Albert v Motor Insurers' Bureau* supra at 320 and 1354 per Viscount Dilhorne. In *Hardy v Motor Insurers' Bureau* supra at 757 and 744, Lord Denning MR said he hoped the point would never be taken. The court has not raised any objection independently: *Coward v Motor Insurers' Bureau* supra.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/763. Adding the Motor Insurers' Bureau as a defendant.

763. Adding the Motor Insurers' Bureau as a defendant.

Where a third party is injured by an uninsured driver, the Motor Insurers' Bureau¹ is entitled² to be added as a party to the proceedings brought by the third party against the driver as the Bureau has no power under the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement³ to control the steps taken in the litigation by the third party⁴.

Where the third party is injured by an untraced driver, the Bureau is not entitled to be added as a party as it is not necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon⁵. The Bureau is sufficiently protected under the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement⁶ if it requests the claimant to take all such steps as are necessary to obtain judgment against an identified person, for all matters would then be properly and fully investigated⁷.

1 As to the Bureau see PARA 757 ante.

2 The court may order a person to be added as a new party if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue: CPR 19.2; and see CIVIL PROCEDURE Vol 11 (2009) PARAS 213-214.

3 As to the agreement see PARA 758 ante.

4 *Gurtner v Circuit* [1968] 2 QB 587, [1968] 1 All ER 328, CA.

5 *White v London Transport* [1971] 2 QB 721, [1971] 3 All ER 1, CA.

6 Ie under the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement cl 14: see PARA 758 text and note 18 ante.

7 *White v London Transport* [1971] 2 QB 721, [1971] 3 All ER 1, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/764. Article 75.

764. Article 75.

Article 75¹ is an agreement for the efficient, expeditious and economical carrying out of certain obligations of the main Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement². Its general effect is to secure that, when a third party claim falling within the category with which the Bureau has undertaken by the main agreement to deal is put forward, the insurer who is required domestically as between insurers to contest and satisfy the claim is the insurer who has, in fact, issued a policy of insurance in respect of the car in question. It is then purely a matter of financial adjustment between that insurer and other insurers who are parties to the agreement as to how the liability has to be shared out. Thus, if a car insured by an insurance company is involved in an accident involving third party liability while it is being driven by a thief who has stolen it, the insurance company must deal with and satisfy the claim in so far as it is a compulsorily insurable claim. The value of the claims so carried by the insurance company on risk in respect of cars involved in accidents not covered by insurance is then carried into the contribution account by which the Motor Insurers' Bureau is supported. How much of the bill is still left in the final accounting to the insurance company which in the first instance satisfied the claim depends on the accident and contribution ratios of all the contributing companies subscribing to the support of the Bureau.

The general effect of these arrangements is that it is no longer necessary for a third party injured in a motor accident to rely on the general statutory provisions relating to subrogation on the insolvency of the insured³, or the provisions imposing on insurers the duty of satisfying judgments in favour of third parties⁴; no advantage is to be derived from pursuing the technicalities of either statutory remedy once the same pecuniary result can be achieved by the extra-statutory Motor Insurers' Bureau Agreement, reinforced as it is by Article 75.

1 le so named by reference to article 75 of the articles of association of the Motor Insurers' Bureau. See PARA 757 ante.

2 As to the agreement see PARA 758 ante.

3 See the Third Parties (Rights against Insurers) Act 1930; and PARAS 679-684 ante.

4 See the Road Traffic Act 1988 ss 151, 152 (both as amended); and PARA 748 ante.

UPDATE

764 Article 75

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/9. MOTOR VEHICLE INSURANCE/(5) COMPULSORY INSURANCE IN RELATION TO MOTOR VEHICLES/(viii) The Motor Insurers' Bureau/765. Victims of accidents abroad.

765. Victims of accidents abroad.

A resident of the United Kingdom¹ who is injured in an accident caused by or arising out of the use of a vehicle which is normally based in an EEA state² and which occurs on the territory of an EEA state (other than the United Kingdom) or a subscribing state³, may make a claim for compensation from the Motor Insurers' Bureau⁴. Prior to making the claim the injured party must have made a request for information concerning the insurance of the vehicle alleged to have been responsible for the accident⁵ and it must have proved impossible to identify that vehicle or, within a period of two months of the request, to identify an insurance undertaking which insures the use of the vehicle⁶. If the injured person satisfies these requirements the Bureau must compensate him as if the accident had occurred in Great Britain⁷.

A resident of the United Kingdom who claims to be entitled to compensation in respect of an accident occurring in an EEA state (other than the United Kingdom) or in a subscribing state where the loss or injury has been caused by or arises out of the use of a vehicle which is normally based⁸ in and insured through an establishment in an EEA state (other than the United Kingdom) may make a claim for compensation from the Bureau if certain conditions are satisfied⁹. The conditions are:

- 237 (1) he has not commenced legal proceedings against the insurer of the vehicle the use of which caused the accident¹⁰; and either
- 238 (2) he has claimed compensation from the insurer of the vehicle, or the insurer's claims representative, and neither the insurer nor the claims representative has provided a reasoned reply to the claim within three months of its being made¹¹; or
- 239 (3) the insurer has failed to appoint a claims representative in the United Kingdom, and the injured party has not claimed compensation directly from the insurer¹².

The Bureau must respond to a claim for compensation within two months of receiving it¹³. Upon receipt of a claim the Bureau must immediately notify (a) the insurer of the vehicle alleged to have caused the accident, or that insurer's claims representative; (b) the foreign compensation body¹⁴ in the EEA state in which that insurer's establishment is situated; and (c) if known, the person who is alleged to have caused the accident, that it has received a claim from the injured party and that it will respond to that claim within two months from the date on which the claim was received¹⁵. The Bureau must indemnify the injured party in respect of the loss and damage arising from the accident if the injured party satisfies the Bureau that¹⁶:

- 240 (i) a person liable to the injured party in respect of the accident is insured through an establishment in an EEA state (other than the United Kingdom)¹⁷; and
- 241 (ii) the amount of loss and damage (including interest) that is properly recoverable in consequence of that accident by the injured party from that person under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident¹⁸.

1 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

2 'EEA state' means a state which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 and the Protocol adjusting the Agreement signed at Brussels on 17 March

1993: Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, SI 2003/37, reg 2(1). A vehicle is normally based in the state of which the vehicle bears a registration plate, or in cases where no registration is required for that type of vehicle the state in which an insurance plate or a distinguishing sign analogous to a registration plate is issued, or in cases where neither registration plate nor insurance plate nor distinguishing sign is required the state in which the keeper of the vehicle is permanently resident: reg 2(2).

3 'Subscribing state' means a state other than an EEA state whose national insurer's Bureau has joined the Green Card System: *ibid* reg 2(1). The system is that relating to the International Motor Insurance Card implemented in respect of vehicles brought into the United Kingdom by the Motor Vehicles (International Motor Insurance Card) Regulations 1971, SI 1971/792; see *PARA 730 ante*.

4 Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, SI 2003/37, regs 10, 13(1)(a), (2)(a). As to the Bureau see *PARA 757 ante*.

5 See *ibid* reg 13(1)(b). The information which may be requested in respect of a vehicle is (1) the name and address of any insurer who has issued a UK insurance policy or European insurance policy covering the use of that vehicle at the time the accident occurred; (2) the number of that policy; (3) the name and address of that insurer's claims representative in the state of residence of the injured party; and (4) where the information centre is satisfied that the injured party has a legitimate interest in obtaining that information, the name and address of the registered keeper of the vehicle or, where the territory in which the vehicle is normally based is an EEA state other than the United Kingdom, the person having custody of the vehicle: reg 9(2), (4).

6 *Ibid* reg 13(1)(c).

7 *Ibid* reg 13(2). For the meaning of 'Great Britain' see *PARA 8 note 3 ante*.

8 As to where a vehicle is normally based see note 2 *supra*.

9 Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, SI 2003/37, reg 11(1), (2).

10 *Ibid* reg 11(2)(a).

11 *Ibid* reg 11(3)(a).

12 *Ibid* reg 11(3)(b).

13 *Ibid* reg 12(2). The Bureau must cease forthwith to act in respect of a claim as soon as it becomes aware that the insurer or the claims representative of that insurer has made a reasoned response to the claim, or the injured party has commenced legal proceedings against the insurer: reg 12(5).

14 'Foreign compensation body' means the person or body established or approved in the EEA state to fulfil similar functions to those of the Bureau under the regulations: see *ibid* reg 2(1).

15 *Ibid* reg 12(1).

16 *Ibid* reg 12(3).

17 *Ibid* reg 12(4)(a).

18 *Ibid* reg 12(4)(b).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(1) NATURE OF REINSURANCE/766. Forms of reinsurance.

10. REINSURANCE

(1) NATURE OF REINSURANCE

766. Forms of reinsurance.

A contract of reinsurance may insure a single direct contract¹, in which case it is referred to as 'facultative', or it may reinsure a class of direct risks² accepted by the reinsured, in which case it is referred to as 'treaty' reinsurance. A treaty may be obligatory on both sides so that the reinsured is required to cede accepted risks to the reinsurer and the reinsurer is required to accept them³; it may be facultative on both sides so that there is no obligation to cede and no obligation to accept risks which are proposed to be ceded; or it may be facultative-obligatory so that the reinsured is not required to cede risks but the reinsurer is required to accept such risks as are ceded⁴. Facultative contracts are generally proportional, in that the reinsured bears an agreed deductible and the reinsurer and the reinsured share the remainder of the risk; treaties written in surplus or quota share form are likewise proportional. Treaties may also be non-proportional, so that the reinsurer alone faces liability once aggregate losses have reached a given figure (the ultimate net loss): such treaties are known as 'excess of loss' treaties.

Reinsurance in all of its forms is regarded for regulatory purposes as insurance and the class of business reinsured also determines the class of reinsurance⁵.

A contract of reinsurance is distinct from the direct contract, and there is no privity of contract between reinsurer and insured⁶. The direct policy of insurance and the policy of reinsurance are entirely separate contracts. Thus if the reinsured has become insolvent, the insured has no cause of action against the reinsurer and the reinsurer is required to pay the whole amount of the loss to the reinsured's liquidator. Some reinsurance agreements contain cut-through clauses which purport to confer a cause of action in favour of the insured against the reinsurer, and a clause of this type is now enforceable in English law under the Contracts (Rights of Third Parties) Act 1999, subject to the operation of the rules of preference in insolvency⁷.

If the reinsurance contract covers a reinsured who is not authorised to carry on insurance business of the class in question, the reinsurance contract remains enforceable against the reinsurer⁸.

1 For the meaning of 'direct contract' see PARA 385 note 7 ante.

2 I.e. risks insured under a direct contract.

3 See *Glencore International AG v Ryan, The Beursgracht* [2001] EWCA Civ 2051, [2002] Lloyd's Rep 574, [2002] Lloyd's Rep IR 335, which illustrates the same principle at the direct level.

4 See *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [1998] 1 Lloyd's Rep 565; affd [2001] UKHL 51, [2001] 2 All ER (Comm) 929, [2002] 1 Lloyd's Rep 154.

5 *Re NRG Victory Insurance* [1995] 1 All ER 533, [1995] 1 WLR 239; *Re Friend's Provident Life Office* [1999] 2 All ER (Comm) 437, [1999] Lloyd's Rep IR 547, CA. As to the classification of contracts of insurance see PARA 21 ante.

6 See the Marine Insurance Act 1906 s 9(2); *Re Norwich Equitable Fire Insurance Co* (1887) 57 LT 241; *Re Law Guarantee Trust and Accident Society, Godson's Claim* [1915] 1 Ch 340.

7 As to the Contracts (Rights of Third Parties) Act 1999 see PARA 6 ante; and CONTRACT. As to the rules of preference in insolvency see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 656-662; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 846-852.

8 *Group Josi Re (formerly known as Group Josi Reassurance SA) v Walbrook Insurance Co Ltd* [1996] 1 All ER 791, [1996] 1 WLR 1152, CA. See now the Financial Services and Markets Act 2000 ss 26-28; para 23 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 81-82. As to the statutory restrictions on carrying on insurance business see PARA 22 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(1) NATURE OF REINSURANCE/767. Insurable interest.

767. Insurable interest.

An insurer has an insurable interest by virtue of his entering into a contract of insurance, and may reinsure accordingly¹. The insurer's insurable interest may be described either as his liability to the insured², or as a further insurance on the insured subject matter³.

1 See the Marine Insurance Act 1906 s 9(1). As to the principle of an insurable interest see PARA 2 ante.

2 *DR Insurance v Seguros America Banamex* [1993] 1 Lloyd's Rep 120.

3 *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516, CA; *Feasey v Sun Life of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807. It has also been said that the subject matter of the reinsurance is that of the direct policy, but that the interest of the reinsured is different from that of the original insured and arises from the fact that the reinsured is the underwriter under the original policy: *Nelson v Empress Assurance Corp'n Ltd* [1905] 2 KB 281 at 285, CA, per Mathew LJ; and see *British Dominions General Insurance Co Ltd v Duder* [1915] 2 KB 394, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(2) FORMATION OF REINSURANCE CONTRACTS/768. General principles of formation.

(2) FORMATION OF REINSURANCE CONTRACTS

768. General principles of formation.

Reinsurance contracts¹ are normally the result of protracted negotiations, with formal agreement being reached by the scratching of a slip. The slip is the normal, but not the only method of creating a contract of reinsurance², and it is possible for a contract to come into existence prior to the scratching of the slip, although this is relatively unusual³.

1 As to the forms of reinsurance see PARA 766 ante.

2 *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] All ER (Comm) 140, [2003] Lloyd's Rep IR 131. As to 'the slip' see PARA 270 ante.

3 See *Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd* [2003] EWCA Civ 283, [2003] All ER (D) 79 (Mar).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(2) FORMATION OF REINSURANCE CONTRACTS/769. Reinsurance in advance of insurance.

769. Reinsurance in advance of insurance.

Reinsurance is frequently taken out in advance of the direct contract¹ to which it is intended to relate, so that the insurer may accept the risk in the knowledge that there is security in the form of reinsurance available to him. Where a reinsurer agrees to reinsure an insurer in advance of the insurer becoming bound, the reinsurer is regarded as having made a standing offer to reinsure which can be accepted by the insurer entering into the direct policy of insurance².

1 For the meaning of 'direct contract' see PARA 385 note 7 ante.

2 *General Accident Fire and Life Assurance Corpn v Tanter, The Zephyr* [1985] 2 Lloyd's Rep 529, CA; *Youell v Bland Welch & Co Ltd (No 2)* [1990] 2 Lloyd's Rep 431; *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [2000] 1 All ER (Comm) 272, [1999] Lloyd's Rep IR 603.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(2) FORMATION OF REINSURANCE CONTRACTS/770. Utmost good faith.

770. Utmost good faith.

A facultative reinsurance contract¹ attracts the same duty of utmost good faith as is applicable to any contract of insurance², so that if the reinsured withholds or misstates material facts, or passes on to the reinsurer false information provided by the direct insured³, the reinsurer has the right to avoid the reinsurance contract⁴. In the case of a non-obligatory treaty⁵, each declaration constitutes a separate contract of insurance and thus is subject to the duty of utmost good faith⁶, although it may be that under an obligatory treaty⁷ there is no duty of utmost good faith in relation to each declaration as the reinsurer has no right to refuse to accept it. Where the reinsurer has the right to avoid a declaration, there is no additional right to avoid the treaty itself or other declarations not tainted by non-disclosure or misrepresentation⁸.

1 For the meaning of 'facultative reinsurance contract' see PARA 766 ante.

2 As to the duty of utmost good faith see PARA 36 et seq ante.

3 Ie the person insured under the direct contract (for the meaning of which see PARA 385 note 7 ante).

4 *Sirius International Insurance Corpn v Oriental Assurance Corpn* [1999] Lloyd's Rep IR 343.

5 For the meaning of 'non obligatory treaty ' see PARA 766 ante.

6 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] 1 Lloyd's Rep 30, [2001] Lloyd's Rep IR 191 per Aikens J (on appeal [2001] 2 Lloyd's Rep 483, CA; [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] Lloyd's Rep IR 230).

7 For the meaning of 'obligatory treaty' see PARA 766 ante.

8 *Société Anonyme D'Intermediaries Luxembourgeois v Farex GIE* [1995] LRLR 116, CA.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(2) FORMATION OF REINSURANCE CONTRACTS/771. Material facts.

771. Material facts.

A number of facts may be material¹ for reinsurance purposes. These include: the nature of the cover provided by the reinsured²; underwriting policy in general³; the existence of unusual terms in the direct contract⁴; the reinsured's claims history⁵; whether the reinsured's reserving policy for possible losses is one not commonly found in the market⁶; and, at least where there is an express question, the level of the reinsured's retention⁷.

1 As to material facts see generally paras 38-42 ante.

2 *Mander v Commercial Union Assurance Co plc* [1998] Lloyd's Rep IR 93; *Abrahams v Mediterranean Insurance and Reinsurance Co* [1991] 1 Lloyd's Rep 216, CA; *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [1998] 1 Lloyd's Rep 565 (affd [2001] UKHL 51, [2001] 2 All ER (Comm) 929, [2002] 1 Lloyd's Rep 154).

3 *Feasey v Sun Life of Canada* [2002] EWHC 868 (Comm), [2002] 2 All ER (Comm) 492, [2002] Lloyd's Rep IR 807.

4 *Property Insurance v National Protector Insurance* (1913) 108 LT 104. For the meaning of 'direct contract' see PARA 385 note 7 ante.

5 *Aiken v Stewart Wrightson* [1995] 3 All ER 449; *Groupama Insurance Co Ltd v Overseas Partners Re Ltd* [2003] EWHC 34 (Comm), [2003] All ER (D) 226 (Jan).

6 *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] All ER (Comm) 140, [2003] Lloyd's Rep IR 131.

7 It is common for the reinsured to be required to warrant that the retention will be maintained for its own account and not reinsured with another reinsurer, although a mere statement that there is to be a retention does not prevent reinsurance elsewhere: *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 Lloyd's Rep 219; *Société Anonyme D'Intermediaries Luxembourgeois v Farex GIE* [1995] LRLR 116, CA. In the absence of any express provision for a retention, there is no implied term that the reinsured will not reinsure its retention elsewhere: *Phoenix General Insurance of Greece v Halvanon Insurance* [1985] 2 Lloyd's Rep 599.

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771 Material facts

NOTE 3--See *Sphere Drake Insurance Ltd v Euro International Underwriting Ltd* [2003] EWHC 1636 (Comm), (2003) Times, 11 August.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(3) TERMS OF REINSURANCE CONTRACTS/772. Implied terms.

(3) TERMS OF REINSURANCE CONTRACTS

772. Implied terms.

In the absence of contrary provision, the following obligations are imposed upon the reinsured under a contract of reinsurance:

- 242 (1) keeping proper records and accounts of risks accepted, premiums received and claims made or notified;
- 243 (2) investigating all claims and confirming that there is liability before liability is accepted;
- 244 (3) investigating risks offered prior to acceptance of them;
- 245 (4) keeping full and accurate accounts showing sums owing and owed;
- 246 (5) ensuring that all amounts owing are collected promptly, and that all amounts payable are paid promptly;
- 247 (6s) making all documents reasonably available to the reinsurer¹.

These implied terms are innominate, so that their breach by the reinsured does not automatically amount to a repudiation of the contract of reinsurance and there will be repudiation only if the breach is a serious one².

¹ *Phoenix General Insurance of Greece v Halvanon Insurance* [1988] QB 216, [1986] 1 All ER 908, [1985] 2 Lloyd's Rep 599 (revsd in part on other grounds [1988] QB 216 at 242, [1987] 2 All ER 152, [1986] 2 Lloyd's Rep 552, CA). As to the forms of reinsurance see PARA 766 ante.

² *Phoenix General Insurance of Greece v Halvanon Insurance* [1988] QB 216, [1986] 1 All ER 908, [1985] 2 Lloyd's Rep 599 (revsd in part on other grounds [1988] QB 216 at 242, [1987] 2 All ER 152, [1986] 2 Lloyd's Rep 552, CA); see also *Baker v Black Sea and Baltic General Insurance Ltd* [1995] LRLR 261 (revsd in part [1998] 2 All ER 833, [1998] Lloyd's Rep IR 327, HL).

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772 Implied terms

NOTES--*Phoenix General Insurance of Greece*, cited, distinguished: *Bonner v Cox* [2005] EWCA Civ 1512, [2006] 1 All ER (Comm) 565.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(3) TERMS OF REINSURANCE CONTRACTS/773. Incorporation from insurance contract.

773. Incorporation from insurance contract.

In the early days of English policies it was universal practice to insert a clause stating: 'Being a reinsurance, subject to the same terms and conditions as the original policy and to pay as may be paid thereon'. More recently, the wording has been replaced by the 'full reinsurance' clause, which refers to the reinsurance being 'as original' and that the reinsurers will 'follow the settlements'¹ of the reinsured. The phrase 'as original' is intended to incorporate the terms of the direct contract into the reinsurance². The effect of the authorities is that the phrase 'as original' will carry into the reinsurance from the direct contract any term of the latter insofar as: (1) the term is germane to the reinsurance; (2) the term makes sense in the reinsurance context, subject to permissible 'manipulation'³; (3) the term is consistent with the express terms of the reinsurance; and (4) the term is apposite for inclusion in the reinsurance⁴. Thus the reinsurance will generally incorporate the insuring and exceptions clauses⁵, and usual clauses, such as the 'continuation clause'⁶ or the 'transit clause'⁷, will also be incorporated by reference into the reinsurance policy by general words⁸. Claims co-operation provisions will be incorporated only in so far as they can be applied to the reinsurance relationship⁹. Arbitration clauses¹⁰, exclusive jurisdiction clauses¹¹ and choice of law clauses¹² will not be regarded as incorporated in the absence of express reference to them in the words of incorporation.

If the reinsurance contract contains an express provision which is inconsistent with the incorporated terms of the direct contract policy then that express provision will prevail¹³ unless it is clear that the reinsurance clause was inserted only to cover the possibility that an equivalent term was missing from the direct contract policy¹⁴.

In some cases, gentle manipulation of the incorporated term may be necessary to make it fit in its new surroundings, although in other cases an incorporated term may be regarded not as a separate obligation between the parties but rather as a statement of the effect of the term in the contract from which it has been incorporated. Thus a term in a contract of insurance which relieves the insured from a duty of disclosure may, when incorporated into a contract of reinsurance, not relieve the reinsured from its duty of disclosure but merely operate as a statement for the purposes of the reinsurance that the reinsured is not entitled to disclosure from the insured¹⁵.

1 As to the formulation 'follow the settlements' see PARA 776 post.

2 This was conceded in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1989] 1 All ER 402, HL. For the meaning of 'direct contract' see PARA 385 note 7 ante.

3 Eg, altering the word 'insured' to 'reinsured'.

4 *HIH Casualty and General Insurance v New Hampshire Insurance* [2001] Lloyd's Rep IR 224; affd [2001] EWCA Civ 735, [2001] Lloyd's Rep IR 596.

5 As to exceptions clauses generally see PARA 99 ante; as to such clauses in marine insurance see PARA 348 ante.

6 As to continuation clauses see PARA 302 ante.

7 As to transit clauses see PARA 306 ante.

8 *Joyce v Realm Marine Insurance Co* (1872) LR 7 QB 580; *Franco-Hungarian Insurance Co v Merchants Marine Insurance Co* (1888), cited in 5 Com Cas 412; *Charlesworth v Faber* (1900) 5 Com Cas 408; *Marten v Nippon Sea and Land Insurance Co Ltd* (1898) 3 Com Cas 164; *Home Insurance Co of New York v Victoria-*

Montreal Fire Insurance Co [1907] AC 59, PC. The same principle applies at the direct level where an excess layer policy incorporates the terms and conditions of the first layer cover: *Burrows v Jamaica Private Power Co Ltd* [2002] 1 All ER (Comm) 374, [2002] Lloyd's Rep IR 466; *Union Camp Chemicals Ltd (t/a Arizona Chemical) v ACE Insurance SA-NV* [2001] All ER (D) 207 (Jun); *Tradigrain SA v SIAT SpA* [2002] EWHC 106 (Comm), [2002] 2 Lloyd's Rep 553; *Matalan Discount Club (Cash & Carry) Ltd v Tokenspire Properties (North Western) Ltd* [2001] EWHC 449, TCC.

9 *Home Insurance of New York v Victoria-Montreal Fire* [1907] AC 59; *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1996] LRLR 265, [1998] Lloyd's Rep IR 421, CA; *CNA International Reinsurance Co Ltd v Companhia de Seguros Tranquilidade SA* [1999] Lloyd's Rep IR 289. As to claims co-operation clauses see PARA 777 post.

10 *Pine Top Insurance Co Ltd v Unione Italiana Anglo-Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476; *Excess Insurance v Mander* [1995] LRLR 358; *Trygg-Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439; *Cigna Life Insurance Co of Europe SA NV v Intercaser SA de Seguros y Reaseguros* [2002] 1 All ER (Comm) 235, [2001] Lloyd's Rep IR 821; *AIG Europe SA v QBE International Insurance Ltd* [2002] Lloyd's Rep IR 22; *American International Speciality Lines Insurance Co v Abbott Laboratories* [2002] EWHC 2714 (Comm), [2003] 1 Lloyd's Rep 267. As to arbitration clauses see PARAS 185-188 ante.

11 *AIG Europe (UK) Ltd v The Ethniki* [2000] 2 All ER 566, [2000] 1 All ER (Comm) 65.

12 *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] Lloyd's Rep IR 472.

13 *Franco-Hungarian Insurance Co v Merchants Marine Insurance Co* (1888) cited in 5 Com Cas 412.

14 *Groupama Navigation et Transports v Catatumbo CA Seguros* [2000] 2 All ER (Comm) 193, [2001] Lloyd's Rep IR 141, CA.

15 *HIH Casualty and General Insurance Co v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] Lloyd's Rep 161, [2001] Lloyd's Rep IR 596. As to disclosure generally see PARAS 37-44 ante; and in relation to marine insurance see PARAS 393-407 ante.

UPDATE

773 Incorporation from insurance contract

NOTE 2--See *American International Marine Agency of New York Inc v Dandridge* [2005] EWHC 829 (Comm), [2005] All ER (D) 48 (May) (term in supplementary binder agreed by insurer after reinsurance contract made was not incorporated into reinsurance contract).

NOTE 11--See *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2005] EWHC 2755 (Comm), [2006] Lloyd's Rep IR 409.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(3) TERMS OF REINSURANCE CONTRACTS/774. Presumption of back to back cover.

774. Presumption of back to back cover.

Where the reinsurance is proportional¹, there is a presumption that the terms of the reinsurance contract should be construed in the same fashion as the terms of the direct contract² policy, in order to secure back to back cover for the reinsured. This presumption was first adopted³ in order to overcome problems arising where the reinsurance contract and the direct contract are governed by different applicable laws⁴. The same principle has been applied to ensure that the two contracts are of the same duration⁵, and it has even operated to ensure consistency between differently worded terms in the direct and reinsurance contracts⁶. However, the presumption of back to back cover cannot operate to remove an express limitation of cover in the reinsurance contract where the insurers have not themselves chosen to adopt the same limitation on their liability in the direct contract⁷.

The presumption of back to back cover has no part to play in non-proportional reinsurances, in particular excess of loss treaties⁸. The interests of the insurer and of the reinsurer are quite separate in this situation, and there is no justification to construe the words of the reinsurance contract other than in accordance with their ordinary and natural meaning even if the outcome is that the cover is more restricted than under the direct contract⁹.

1 As to proportional reinsurance see PARA 766 ante.

2 For the meaning of 'direct contract' see PARA 385 note 7 ante.

3 See in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1989] 1 All ER 402, HL.

4 See *Ace Insurance SA-NV v Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 All ER (Comm) 802, [2001] Lloyd's Rep IR 504.

5 *Commercial Union Assurance Co plc v Sun Alliance Insurance Group plc and Guardian Royal Exchange plc* [1992] 1 Lloyd's Rep 475, but contrast *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127, CA; see also *Marine Insurance Co Ltd v Grimmer* [1944] 2 All ER 197 at 199, CA.

6 *Groupama Navigation et Transports v Catatumbo CA Seguros* [2000] 2 All ER (Comm) 193, [2001] Lloyd's Rep IR 141, CA.

7 *GE Reinsurance Corp'n v New Hampshire Insurance Co* [2003] EWHC 302 (Comm), [2003] All ER (D) 392 (Feb).

8 As to non-proportional reinsurance see PARA 766 ante.

9 *Axa Reinsurance (UK) plc v Field* [1996] 3 All ER 517, [1996] 1 WLR 1026, HL; *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1996] LRLR 265, [1998] Lloyd's Rep IR 421, CA.

UPDATE

774 Presumption of back to back cover

NOTES--See *Goshawk Syndicate Management Ltd v XL Speciality Insurance Co* [2004] EWHC 1086 (Comm), [2004] 2 All ER (Comm) 512.

NOTE 5--In order to establish liability against a reinsurer, the reinsured must establish that loss is within the risk assumed under the underlying insurance contract, and that the relevant risk has been assumed under the reinsurance contract: *Wasa International*

Insurance Co v Lexington Insurance Co; AGF Insurance Ltd v Lexington Insurance Co
[2009] UKHL 40, [2010] 1 AC 180, [2009] 4 All ER 909.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(4) LOSSES UNDER REINSURANCE CONTRACTS/775. Reinsured must prove loss.

(4) LOSSES UNDER REINSURANCE CONTRACTS

775. Reinsured must prove loss.

Subject to any provision to the contrary in the reinsurance contract, the reinsured, in order to recover from the reinsurer, must: (1) demonstrate that he was liable to the reinsured under the terms of the direct contract¹; and (2) demonstrate that the loss is covered by the reinsurance contract. Requirement (1) above means that the reinsured's liability must be established and quantified either by a judgment or arbitration award, or under a settlement which is based on the reinsured's actual liability to the reinsured. A settlement which does not meet this requirement is not binding on the reinsurer even if it is made in good faith by the reinsured and is to the benefit of the reinsured and the reinsurer².

The right of the reinsured to receive payment from the reinsurer is not based upon actual payment by the reinsured, but rather by the establishment and quantification of its liability by means of judgment, award or settlement³. The standard provisions of the ultimate net loss clause in an excess of loss reinsurance treaty, which require that the reinsured 'shall actually have paid' in order to recover does not affect the position, as these words merely confirm that the reinsured's liability has to be established and quantified⁴.

There is no implied term in a reinsurance contract that the reinsurer will indemnify the reinsured for the costs of defending any claim made by the insured under the direct policy, even where the reinsurer has required the reinsured to defend the claim so that the reinsured's loss can be established as a matter of law⁵.

¹ For the meaning of 'direct contract' see PARA 385 note 7 ante.

² *Hill v Mercantile and General Reinsurance Co plc* [1996] 3 All ER 865, [1996] 1 WLR 1239, HL; *Commercial Union Insurance Co plc v NRG Victory Reinsurance Ltd* [1998] 2 All ER 434, [1998] 2 Lloyd's Rep 600, CA.

³ *Re Eddystone Marine Insurance Co, ex p Western Insurance Co* [1892] 2 Ch 423. See also *Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co* [1912] 1 Ch 138; *Re Law Guarantee Trust and Accident Society Ltd v Liverpool Mortgage Insurance Co Ltd* [1914] 2 Ch 617, CA.

⁴ *Re a Company (No 0013734 of 1991)* [1992] 2 Lloyd's Rep 415, [1993] BCLC 59; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, [1996] 3 All ER 46, HL. For the contrary position under New York law see *Cleaver and Bodden v Delta American Reinsurance Co* [2001] UKPC 6, [2002] Lloyd's Rep IR 167. For the meanings of 'ultimate net loss' and 'excess of loss treaty' see PARA 766 ante.

⁵ *Scottish Metropolitan Assurance v Groom* (1925) 20 Ll L R 44; *Insurance Co of Africa v SCOR (UK) Reinsurance Ltd* [1985] 1 Lloyd's Rep 312, CA; *Baker v Black Sea and Baltic General Insurance Co Ltd* [1998] 2 All ER 833, [1998] 1 WLR 974, HL. The contrary decision in *British Dominions General Insurance v Duder* [1915] 2 KB 394 is apparently now unsound.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(4) LOSSES UNDER REINSURANCE CONTRACTS/776. Follow the settlements.

776. Follow the settlements.

The position is altered where the policy contains the formulation 'follow the settlements'¹. While it remains necessary for the reinsured to establish that the loss falls within the terms of the reinsurance contract, the strict obligation to show that the reinsured's liability to the insured has been established and quantified as a matter of law is replaced by the lesser obligation on the reinsured to show that any settlement with the insured was reached by the reinsured in a bona fide and businesslike fashion². Thus, as long as the settlement was based on potential legal liability, and was not purely ex gratia or made for extraneous reasons³, the reinsured is entitled to recover. The burden of proving that the settlement was not made in a bona fide and businesslike fashion is borne by the reinsurer⁴.

1 Replacing the earlier formulation 'to pay as may be paid thereon': the earlier form of wording precluded the reinsurer from disputing the amount paid by way of compromise provided there was a loss on the original policy: *Chippendale v Holt* (1895) 1 Com Cas 197; *Marten v Steamship Owners' Underwriting Association* (1902) 7 Com Cas 195; *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376 at 386. Bigham J's dictum in *Western Assurance Co of Toronto v Poole* supra that the words 'to pay as may be paid thereon' precluded the reinsurer from disputing the amount paid by way of compromise providing that there was a loss under the original policy, was approved in *Insurance Co of Africa v SCOR (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA; see also *Australian Widows' Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd* [1914] AC 634, PC (life assurance). Reinsurance contracts against total loss only sometimes contain a clause binding the reinsurer to pay in the event of a 'compromised' or 'arranged' loss; for the meaning of these terms see *Gurney v Grimmer* (1932) 38 Com Cas 7, 44 Ll L Rep 189, CA; *Oscar L Aronsen Inc v Compton, The Megara* [1973] 2 Lloyd's Rep 361, Dist Ct, Southern Dist NY (affd [1974] 1 Lloyd's Rep 590, US Ct of Apps (2nd Circ)). The reassured cannot recover under such a clause without proving that he was in fact liable to pay an actual or constructive total loss, or showing that the original assured had put forward a claim in good faith for a total loss, with or without an alternative claim for a partial loss: *Street v Royal Exchange Assurance* (1913) 18 Com Cas 284 (affd (1914) 19 Com Cas 339, CA); *Bergens Dampskibs Assurance Forening v Sun Insurance Office Ltd* (1930) 143 LT 435. See also *Excess Insurance Co Ltd v Mathews* (1925) 31 Com Cas 43 at 52 (fire insurance); *Versicherungs und Transport AG Daugava v Henderson* (1934) 39 Com Cas 154 (affd on other grounds 39 Com Cas 312, CA) (claims payable in a foreign currency); *Chartered Trust and Executor Co v London and Scottish Insurance Corp'n* (1923) 16 Ll L Rep 233. As to exchange rates for the payment of debts see generally FINANCIAL SERVICES AND INSTITUTIONS.

2 *Insurance Co of Africa v SCOR (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA.

3 *GAN Insurance Co v Tai Ping Insurance Co (No 3)* [2002] EWCA Civ 248, [2002] Lloyd's Rep IR 612.

4 *Charman v GRE Assurance plc* [1992] 2 Lloyd's Rep 607.

UPDATE

776 Follow the settlements

NOTE 2--See *Assicurazioni Generali SpA v CGU International Insurance plc* [2004] EWCA Civ 429, [2004] 2 All ER (Comm) 114; *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2007] EWCA Civ 1208, [2007] All ER (D) 357 (Nov); and *Equitas Ltd v R and Q Reinsurance Company (UK) Ltd; Equitas Ltd v Ace European Group Ltd* [2009] EWHC 2787 (Comm), [2009] All ER (D) 154 (Nov) (reinsured allowed to use actuarial modelling in order to prove recoverable losses by disaggregating claims and separating irrecoverable claims).

NOTE 4--See *Korea National Insurance Corp'n v Allianz Global Corporate & Specialty AG* [2007] EWCA Civ 1066, [2007] All ER (D) 440 (Oct).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(4) LOSSES UNDER REINSURANCE CONTRACTS/777. Claims co-operation and claims control clauses.

777. Claims co-operation and claims control clauses.

It is common for reinsurance agreements to limit the effect of a follow the settlements provision by the use of a claims co-operation or claims control clause, the effect of which, depending on the wording, is to prevent the assured from reaching a settlement without the consent of the reinsurers or from negotiating any settlement on his own behalf. If the claims co-operation clause is expressed to be a condition precedent to the reinsurers' liability no claim can be made against them even if the reinsured can prove its loss, and where the clause requires the reinsurers to consent to any settlement they are entitled to withhold their consent for any reason other than one unconnected with the claim itself¹. By contrast, if the clause is not expressed to be a condition precedent to the reinsurer's liability, the reinsured is able to recover despite failing to comply with its terms as long as actual legal liability to the insured can be shown².

1 *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2002] Lloyd's Rep IR 667.

2 *Insurance Co of Africa v SCOR (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA.

UPDATE

777 Claims co-operation and claims control clauses

NOTES 1, 2--The assertion by a reinsurer of a defence to liability arising from breach of a condition precedent is not a choice by him between inconsistent rights but simply an unproven assertion that he is not liable to the reinsured on that account: *Lexington Insurance Co v Multinacional De Seguros SA* [2008] EWHC 1170 (Comm), [2009] 1 All ER (Comm) 35.

NOTE 1--See also *Eagle Star Insurance Co Ltd v JN Cresswell* [2004] EWCA Civ 602, [2004] 2 All ER (Comm) 244 (clause entitling reinsurers to control negotiations only required reassured to notify reinsurer when negotiations began so they could specify form of negotiations and what offers should be made).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(4) LOSSES UNDER REINSURANCE CONTRACTS/778. Inspection clauses.

778. Inspection clauses.

Reinsurance contracts, particularly treaties¹, generally contain inspection clauses whereby the reinsurer is entitled to examine the reinsured's books and records in so far as they contain details of the business written by the reinsured within the scope of the reinsurance. The clause may also extend to the provision of information for the purpose of settling claims made by the direct insured² against the reinsured, although there will generally be a separate claims co-operation or claims control provision dealing with that matter. Inspection clauses are often framed in general terms, so that the reinsurer can exercise the right of inspection at any time during the currency of the reinsurance contract. It is not the practice in this country for frequent and regular inspections to be conducted, and such inspections tend to become of particular significance only when there have been heavy losses or when the reinsured has actually presented a claim.

The precise effect of a breach of an inspection clause depends upon the manner in which it is drafted. If the clause is a condition precedent to the reinsurer's liability then, subject to any waiver by the reinsurers, no claim may be made by the reinsured until the obligations in the clause have been complied with. In practice, however, inspection clauses are not framed in this way, and the reinsured's refusal to allow inspection or to co-operate fully will not prevent the reinsured from making a claim under the reinsurance contract³.

A right of inspection is exercisable at any time, on reasonable notice, and for any reason⁴, although an inspection must be carried out in good faith and not purely as a fishing expedition seeking for justification for a decision not to make payment⁵. Where a claim has been made by the reinsured and proceedings have been brought for payment, any application by the reinsurer to stay the proceedings so that rights under an inspection clause may be exercised will be refused unless the reinsurer has earlier made a request for inspection which has been denied by the reinsured⁶.

1 As to the forms of reinsurance see PARA 766 ante.

2 I.e. the insured under a direct contract (for the meaning of which see PARA 385 note 7 ante).

3 *Baker v Black Sea and Baltic Insurance* [1995] LRLR 261 (revsd in part [1998] 2 All ER 833, [1998] Lloyd's Rep IR 327, HL).

4 *Re a Company (No 008725 of 1991, ex p Pritchard* [1992] BCLC 633.

5 *Société Anonyme D'Intermediaries Luxembourgeois v Farex GIE* [1995] LRLR 116, CA.

6 *Pacific and General Insurance Co Ltd (in liquidation) v Baltica Insurance Co (UK) Ltd* [1996] LRLR 8; *Trinity Insurance Co Ltd v Overseas Union Insurance Ltd* [1996] LRLR 156; *Aetna Reinsurance Co (UK) Ltd v Central Reinsurance Corpn Ltd* [1996] LRLR 165.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/10. REINSURANCE/(4) LOSSES UNDER REINSURANCE CONTRACTS/779. Limitation of actions.

779. Limitation of actions.

The reinsured has six years from the date on which its action against the reinsurer has accrued to issue a claim form against them¹. The date on which an action against a reinsurer accrues is the date on which the reinsured's liability towards the assured is established and quantified by a judgment, arbitration award or binding settlement². In reinsurance cases there are often contractual provisions which operate to defer the reinsurer's liability to provide an indemnity, and such provisions may operate also to defer the running of the limitation period. It would nevertheless seem that the general rule continues to apply even where the reinsured is required to make payment under the direct contract³ as a condition of recovering from the reinsurer⁴, and the fact that, at the time of the reinsured's loss, the precise amount payable by the reinsurer under a treaty cannot be calculated does not prevent the running of time⁵.

1 Limitation Act 1980 s 5.

2 *Baker v Black Sea & Baltic General Insurance Co Ltd* [1995] LRLR 261 (revsd in part [1998] 2 All ER 833, [1998] Lloyd's Rep IR 327, HL); *Halvanon Insurance Co Ltd v Companhia de Seguros do Estado de Sao Paulo* [1995] LRLR 303, CA; *North Atlantic Insurance Co Ltd v Bishopsgate Insurance Ltd* [1998] 1 Lloyd's Rep 459; *Sphere Drake Insurance plc v Basler Versicherungs-Gesellschaft* [1998] Lloyd's Rep IR 35.

3 For the meaning of 'direct contract' see PARA 385 note 7 ante.

4 *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep 541.

5 *North Atlantic Insurance Co Ltd v Bishopsgate Insurance Ltd* [1998] 1 Lloyd's Rep 459; *Sphere Drake Insurance plc v Basler Versicherungs-Gesellschaft* [1998] Lloyd's Rep IR 35.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(1) SCOPE OF PECUNIARY LOSS INSURANCE/780. Meaning of pecuniary loss insurance.

11. PECUNIARY LOSS INSURANCE

(1) SCOPE OF PECUNIARY LOSS INSURANCE

780. Meaning of pecuniary loss insurance.

In one sense all insurances are related to a contingency; in life or endowment insurance the contingency is death or the survival of the insured to a particular date; in personal accident or sickness insurance the contingency is injury by accident or disablement by disease; in property insurance the contingency is the peril to the property which is insured against; in liability insurance the contingency is incurring the specified liability to a third party¹. However, apart from the contingencies covered by these particular types of insurance there remains a wide field representing (1) what a person would or might have earned or acquired but for the happening of a particular event, and (2) the danger, in the sense of the possibility of a loss being incurred if a particular event happens. Therefore, pecuniary loss insurance may be defined in general terms as an insurance, not falling within any of the classes of insurance previously mentioned, which provides for the making of a payment in the event of a specified event occurring, the payment representing either the loss, or the possibility of loss, which that event entails².

1 For the principle that a policy which covers the insured against legal liability to a third person is a policy of liability and not of pecuniary loss insurance see PARA 695 text and note 6 ante.

2 For these purposes pecuniary loss insurance is classified as 'miscellaneous financial loss' insurance and is a 'general contract of insurance': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch1 Pt I para 16; see PARA 21 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(1) SCOPE OF PECUNIARY LOSS INSURANCE/781. Basis need not be indemnity.

781. Basis need not be indemnity.

Frequently, insurances against a contingency are contracts of indemnity¹. Although accurate ascertainment of the loss may be impossible, the policy may lay down a formula by which calculation is to be made with a view to achieving as accurate an estimate as is reasonable or practicable. In many cases the attempt to do this is not even made, the insurers being content to pay a stipulated sum, comparable with an agreed value, in the event of the contingency occurring.

¹ See eg *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; and PARA 792 post. As to the principle of indemnity see PARA 3 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(1) SCOPE OF PECUNIARY LOSS INSURANCE/782. Scope of pecuniary loss insurance and need for insurable interest.

782. Scope of pecuniary loss insurance and need for insurable interest.

It may be said that there are very few risks which cannot be placed, either with an insurance company or at Lloyd's¹; certainly in the field of pecuniary loss insurance the range of risks is wide and varied. Insurance can be effected against the contingency of the birth of a child who would defeat the prospects of a remainderman²; of bad weather interfering with an athletic meeting³ or a cricket match⁴; of the outbreak of war or the conclusion of peace⁵; of restrictions on transferring currency operating so as to deprive an exporter of the price of goods sold to a foreign buyer⁶.

A fidelity policy which insures the insured against losses which he may sustain by the default of an employee is a policy of pecuniary loss insurance⁷; but a policy which insures the insured against claims by third parties in respect of the default of the insured or his employees in the conduct of his profession is generally a policy of liability insurance and not of fidelity insurance⁸. However, if a policy of the former class contains a provision by virtue of which the insurers may be bound in certain circumstances to pay a claim even though it is legally a bad claim, it appears that the policy is one of pecuniary loss insurance⁹.

A policy of pecuniary loss insurance is not valid unless the insured has an insurable interest in the sense of being likely to sustain a loss in the event of the contingency occurring¹⁰.

1 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135 at 140, HL, per Lord Halsbury.

2 *Carr v Carr* (1912) 106 LT 753.

3 *London County Cycling and Athletic Club v Beck* (1897) 3 Com Cas 49.

4 *Leon v Casey* [1932] 2 KB 576 at 581, CA, per Scrutton LJ.

5 *Kotzias v Tyser* [1920] 2 KB 69; *Lloyd v Bowring* (1920) 36 TLR 397. Such insurance is invalid unless there is an insurable interest: see note 10 infra.

6 *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; *L Lucas Ltd v Export Credits Guarantee Department* [1974] 2 All ER 889, [1974] 1 WLR 909, HL. See further PARA 792 post. As to the three main types of pecuniary loss insurance see PARAS 783-804 post.

7 As to fidelity policies see further PARAS 783-789 post.

8 See *Goddard and Smith v Frew* [1939] 4 All ER 358 at 361, CA, per Goddard LJ.

9 *West Wake Price & Co v Ching* [1956] 3 All ER 821 at 826, [1957] 1 WLR 45 at 51 per Devlin J (policy containing a Queen's Counsel clause); see PARA 695 ante.

10 See *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67 (policies of reinsurance providing for payments in event of peace between Great Britain and Germany not being declared by specified date; policies contained ppi (policy proof of interest) clause; no proof of insurable interest by original insured; policies illegal and void under the Life Assurance Act 1774 (see PARAS 535-544 ante); premiums irrecoverable). As to the recovery of premiums cf *Aubert v Walsh* (1810) 3 Taunt 277; *Busk v Walsh* (1812) 4 Taunt 290 (premiums recoverable where insured indicated intention to rescind before the specified date).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(i) Scope of Fidelity Insurance/783. Breach of fidelity as an insurable contingency.

(2) FIDELITY INSURANCE

(i) Scope of Fidelity Insurance

783. Breach of fidelity as an insurable contingency.

A policy of fidelity insurance is intended to protect the insured against the contingency of a breach of fidelity on the part of a person in whom confidence has been placed¹. Usually the relationship between the insured and the person whose fidelity is insured is that of employer and employee².

¹ Protection may also be obtained in such a case by means of a fidelity guarantee. As to such guarantees see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1042, 1101, 1133, 1250.

² See *Walker v British Guarantee Association* (1852) 18 QB 277.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(i) Scope of Fidelity Insurance/784. Extent of protection.

784. Extent of protection.

A policy of fidelity insurance normally contemplates loss by the criminal misappropriation of money or securities¹; the insurance is not for specific subject matter but is for the pecuniary loss suffered by the employer. The perils insured against may be described as the employee's fraud or dishonesty² or his want of integrity, honesty or fidelity³. In general, the technical terms of the criminal law are used, and the policy refers specifically to losses by theft. Where this is the case, the words must be construed strictly; they bear the same meaning as in an indictment⁴ and the insured cannot recover unless he proves that the particular offence described in the policy has in fact been committed⁵. The policy may be extended to cover acts which are not criminal, such as the wilful default⁶ or the negligence⁷ of the employee⁸, but does not cover losses due to a crime in which the employee has not been guilty of any fault, for instance where he is robbed of the money belonging to the insured⁹.

1 *Re Norwich Provident Insurance Society, Bath's Case* (1878) 8 ChD 334 at 341, CA, per Jessel MR. Such a policy is not, it appears, open to objection on grounds of public policy; *Goddard and Smith v Frew* [1939] 4 All ER 358 at 362, CA, per Goddard LJ.

2 *Ravenscroft v Provident Clerks' and General and Guarantee Association* (1888) 5 TLR 3.

3 *American Surety Co of New York v Wrightson* (1910) 103 LT 663; *Proudfoot plc v Federal Insurance Co* [1997] LRLR 659; *New Hampshire Insurance Co v Philips Electronics North America Corp* [1999] Lloyd's Rep 66, [1999] Lloyd's Rep IR 58, CA.

4 As to theft see generally CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282 et seq.

5 *Debenhams Ltd v Excess Insurance Co Ltd* (1912) 28 TLR 505 per Hamilton J ('embezzlement'); but see *Equitable Trust Co of New York v Henderson* (1930) 47 TLR 90 ('forged'). Prosecution for the offence is not a condition precedent to recovery unless the policy expressly so provides; see *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL.

6 *Kenney v Employers' Liability Assurance Corp* [1901] 1 IR 301.

7 *American Surety Co of New York v Wrightson* (1910) 103 LT 663; *Pawle & Co v Bussell* (1916) 114 TLR 805.

8 For the principle that a clause by which insurers agree to pay claims without requiring the insured to dispute them extends only to claims which are wholly within the policy see PARA 785 post.

9 See *Walker v British Guarantee Association* (1852) 21 LJQB 257 (robbery from treasurer of building society who had made covenant in nature of fidelity guarantee).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(ii) Special Features of Fidelity Insurance/785. Risk as described forms basis of policy.

(ii) Special Features of Fidelity Insurance

785. Risk as described forms basis of policy.

The risk of loss under a fidelity policy is governed by the opportunity to be dishonest or negligent afforded by the employee's employment; this varies according to the nature of his particular occupation and the position which he holds¹. The proposer is usually required to provide a statement of the capacity in which the employee is employed and of the nature of his duties, and, if this statement is warranted or incorporated in the policy as part of the definition of the risk, the employee must continue to be employed in accordance with the description throughout the currency of the policy². If at any time after such a policy has commenced the employee is employed in a different capacity³ or is required to perform different duties⁴, the policy does not attach whilst he is so employed or is performing those different duties⁵, since there is an alteration of the risk which affects its identity⁶. An alteration in matters of routine, including the precautions against dishonesty adopted by the employer and the method of checking the employee's accounts, does not affect the identity of the risk and does not in itself preclude the employer from recovering⁷ unless there is an express condition prohibiting such an alteration⁸.

1 *Hay v Employers' Liability Assurance Corpn* (1905) 6 OWR 459, followed in *Elgin Loan and Savings Co v London Guarantee and Accident Co* (1906) 11 OLR 330.

2 *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900; *Haworth & Co v Sickness and Accident Assurance Society* 1891 28 SLR 394; cf *Hearts of Oak Building Society v Law Union and Rock Insurance Co Ltd* [1936] 2 All ER 619 (statements in a proposal as to an employee's duties were no more than statements of present fact); and *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744. As to the effect of variation in the principal debtor's office or duties in the case of a fidelity guarantee see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1101, 1114.

3 See *Cosford Union v Poor Law etc Officers' Mutual Guarantee Association* (1910) 103 LT 463.

4 *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516.

5 See *Cosford Union v Poor Law etc Officers' Mutual Guarantee Association* (1910) 103 LT 463.

6 As to alteration of risk see PARA 123 et seq ante.

7 *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744.

8 *Towle v National Guardian Assurance Society* (1861) 30 LJCh 900.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(ii) Special Features of Fidelity Insurance/786. Payment of premium by employee.

786. Payment of premium by employee.

A fidelity policy may provide for payment of the premium by the employee and in such a case power is reserved to the employer to pay it if the employee fails to do so¹.

¹ If a receipt for premium is given to the employee to be shown to the employer, the insurers cannot repudiate liability on the ground that the premium was not in fact paid: *Re Economic Fire Office* (1896) 12 TLR 142.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(ii) Special Features of Fidelity Insurance/787. Time and notice of loss.

787. Time and notice of loss.

The loss under a fidelity policy takes place when the employer's property is misappropriated, not when the misappropriation is discovered¹. The policy may, in express terms, cover losses discovered during its currency²; the discovery of the loss is not sufficient and the act of misappropriation must have been committed after the policy came into force³. In the absence of some prescribed time limit⁴ the fact that the loss is not discovered until after the policy has expired does not preclude the insured from recovery if the act of misappropriation was committed during its currency⁵.

The duty of giving notice of the loss⁶ to the insurers does not arise until the employer has satisfied himself of his employee's dishonesty; the employer is under no duty to notify mere suspicion⁷. However, if the policy fixes a time from the date of loss for giving notice to the insurers, the insured will be unable to recover if the time has expired before he becomes aware of the loss⁸.

1 *New Zealand University v Standard Fire and Marine Insurance Co* [1916] NZLR 509, NZ CA.

2 *Pennsylvania Co for Insurances on Lives and Granting Annuities v Mumford* [1920] 2 KB 537, CA; *La Positiva Seguros y Reaseguros SA v Jessel* (6 September 2000, unreported); *Universities Superannuation Scheme Ltd v Royal Insurance (UK) Ltd* [2000] 1 All ER (Comm) 266, [2000] Lloyd's Rep IR 524.

3 *Banque Nationale v Lesperance* (1881) 4 LN 147; *Allis-Chalmers Co v Maryland Fidelity and Deposit Co* (1916) 114 LT 433, HL; *London Guarantee and Accident Co v Cornish* (1905) 17 Man LR 148.

4 *Fanning v London Guarantee and Accident Co* [1884] 10 VLR (L) 8; *Commercial Mutual Building Society v London Guarantee and Accident Co* (1891) MLR 7 QB 307.

5 *Ward v Law Property Assurance and Trust Society* (1856) 4 WR 605.

6 As to notice of loss see generally paras 172-174 ante.

7 *Ward v Law Property Assurance and Trust Society* (1856) 4 WR 605.

8 *T H Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd* [1953] 2 Lloyd's Rep 355.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(ii) Special Features of Fidelity Insurance/788. Prosecution of employee.

788. Prosecution of employee.

A fidelity policy may contain a condition requiring the employer to prosecute the defaulting employee upon the request and at the expense of the insurers¹, and a failure to comply with the condition may preclude the insured from enforcing the policy². If, as a result of a successful prosecution, the employer recovers any portion of the misappropriated property, the insurers are entitled to deduct their costs from the amount recovered³.

1 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL.

2 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL; *Canada Life Assurances Co v London Guarantee Co* (1900) 9 Que QB 183.

3 See *Hatch, Mansfield and Co Ltd v Weingott* (1906) 22 TLR 366, followed in *Crown Bank v London Guarantee and Accident Co* (1908) 17 OLR 95.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(2) FIDELITY INSURANCE/(ii) Special Features of Fidelity Insurance/789. Deductions from amount of loss.

789. Deductions from amount of loss.

In calculating the amount payable under a fidelity policy, the insurers are entitled to be credited with any commission or salary which would have been payable to the employee if he had not been dishonest, and with any money belonging to the employee in the employer's hands. The amounts owing to the employee must be deducted from the amount of the loss and the insurers are liable for the balance up to the sum insured¹. Where the amount of the loss is greater than the amount insured the deductions are made from the whole amount of the loss and the insurers remain liable for the balance up to the full amount insured². They are also entitled to the benefit of all other policies of insurance, securities or guarantees available in the hands of the employer towards the recoupment of the loss; such benefit is enforceable by contribution³ or subrogation⁴, as the case may be.

1 *Fifth Liverpool Starr-Bowkett Building Society v Travellers Accident Insurance Co Ltd* (1893) 9 TLR 221.

2 *Fifth Liverpool Starr-Bowkett Building Society v Travellers Accident Insurance Co Ltd* (1893) 9 TLR 221; cf *Board of Trade v Guarantee Society* [1910] 1 KB 408n.

3 *American Surety Co of New York v Wrightson* (1910) 103 LT 663. As to contribution see PARAS 210-211 ante.

4 *Employers' Liability Assurance Corp'n v Skipper and East* (1887) 4 TLR 55. As to subrogation see PARAS 195-202 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(i) Scope of Debt Insurance/790. Non-payment of debts as an insurable contingency.

(3) DEBT INSURANCE

(i) Scope of Debt Insurance

790. Non-payment of debts as an insurable contingency.

Wherever a debt exists the creditor is exposed to the risk of loss by reason of the debtor's failure to make repayment¹. This is a risk against which the creditor can protect himself by insurance², which may be effected before the debt is actually incurred³. The insurance may cover the general balance of indebtedness from a particular person or class or persons⁴, and a specific debt is capable of being insured. The debt may be unsecured, as in the case of an ordinary loan⁵ or deposit at a bank⁶, or it may be secured by mortgage⁷ or debenture⁸. In either case the debtor whose default is insured against need not be the principal debtor; if a debt is already secured by means of a guarantee or policy of insurance a policy may be effected to cover the default of the sureties⁹ or of the other insurers¹⁰. It is also possible to take out shortfall insurance, whereby cover is taken out by a financier against any shortfall in revenues on a given day generated by the financed project¹¹.

1 As to the distinction between insurance and guarantee see PARAS 798-799 post.

2 The insurance may cover the costs incurred in taking proceedings to enforce payment by the debtor, but special provision must be made: *Re Law Guarantee Trust and Accident Society* (1913) 108 LT 830.

3 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135 at 141, HL; *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1. Cf *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703 (insurance covering loss to an exporter caused by currency restrictions interfering with his receipt of the price of goods exported; see further PARAS 782 ante, 792 post).

4 *Solvency Mutual Guarantee Co v York* (1858) 3 H & N 588; *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5; *Kazakhstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [1999] 2 All ER (Comm) 445 (affd [2000] 1 All ER (Comm) 708, [2000] Lloyd's Rep IR 371, CA); *Moore Large and Co Ltd v Hermes Credit and Guarantee plc* [2003] EWHC 26 (Comm).

5 *Parr's Bank v Albert Mines Syndicate* (1900) 5 Com Cas 116; *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1.

6 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54, CA; *Murdock v Heath* (1899) 80 LT 50.

7 *Re Birkbeck Permanent Benefit Building Society, Official Receiver v Licenses Insurance Corp* [1913] 2 Ch 34; *Re Law Guarantee Trust and Accident Society* (1913) 108 LT 830.

8 *Shaw v Royce Ltd* [1911] 1 Ch 138; *Finlay v Mexican Investment Corp* [1897] 1 QB 517; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA.

9 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135 at 141, HL.

10 *Macvicar v Poland* (1894) 10 TLR 566; *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1.

11 *DSG Retail Ltd (formerly Dixon Stores Ltd) v QBE International Insurance Ltd* [1999] Lloyd's Rep IR 283; *Screen Partners London Ltd v VIF Filmproduction GmbH* [2002] Lloyd's Rep IR 283; *GE Reinsurance Corp v New Hampshire Insurance Co* [2002] EWHC 302 (Comm).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(i) Scope of Debt Insurance/791. Nature of default insured against.

791. Nature of default insured against.

The nature of the default which gives rise to a claim under a policy of debt insurance varies according to the terms of the policy¹. Non-payment of the debt on the due date² or within a specified time afterwards³ may be sufficient. In such a case it is immaterial to consider the cause of the default⁴. In other circumstances the policy covers non-payment by reason only of the debtor's insolvency⁵, and by the terms of the policy the cover may be restricted to insolvency from a particular cause⁶.

1 *le Sturge & Co v Excess Insurance Co Ltd* [1938] 4 All ER 424 (terms of the policy were not effective to incorporate a gold clause in a bond, the case being limited to guaranteeing redemption of the bond at par); *G and GB Hewitt Ltd v SA Namur-Assurances du Credit* [1999] 1 All ER (Comm) 851, CA (policy excluding losses arising from certain events).

2 *Shaw v Royce Ltd* [1911] 1 Ch 138; *Young v Assets and Investment Insurance Co's Trustee* (1893) 21 R 222, Ct of Sess.

3 *Finlay v Mexican Investment Corp'n* [1897] 1 QB 517; and see *Laird v Securities Insurance Co Ltd* (1895) 22 R 452, Ct of Sess.

4 *Mortgage Insurance Corp'n v IRC* (1887) 57 LJQB 174 at 181 per Hawkins J; *Laird v Securities Insurance Co* (1895) 22 R 452 at 459, Ct of Sess, per Lord Maclaren.

5 *Hambro v Burnand* [1904] 2 KB 10 at 19, CA, per Collins MR; see also *Murdock v Heath* (1899) 80 LT 50. If the debtor is insolvent, a refusal to pay on other grounds is immaterial: *Macvicar v Poland* (1894) 10 TLR 566.

6 *Waterkeyn v Eagle, Star and British Dominions Insurance Co* (1920) 5 Ll L Rep 42.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(i) Scope of Debt Insurance/792. Export credit guarantee insurance.

792. Export credit guarantee insurance.

An exporter of goods to a foreign country is peculiarly vulnerable as regards receiving payment for his goods, and from time to time new devices have to be created in order to facilitate and stimulate international trade¹. One such device takes the form of an insurance against the loss an exporter incurs when:

- 248 (1) the buyer fails to pay for goods he has received; or
- 249 (2) without any breach of condition or warranty on the part of the exporter, the buyer declines to accept goods; or
- 250 (3) without the buyer being in default, governmental difficulties arise in connection with the transfer of currency representing the purchase price.

The Export Credits Guarantee Department issues to exporters policies covering them up to specified percentages against non-commercial risk². These policies are contracts of indemnity³ and, if payment has been made under a policy by the Department in respect of a loss due to restrictions on the export of currency, and the currency is ultimately released and the purchase price paid, the Department, by subrogation, is entitled to receive the purchase price to the extent of its payment, even against the liquidator of the exporters where the exporters are in liquidation⁴.

1 An example in the field of banking may be found in commercial letters of credit; see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 923 et seq.

2 See the Export and Investment Guarantees Act 1991 s 2; and TRADE AND INDUSTRY vol 97 (2010) PARA 918 et seq.

3 *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; *L Lucas Ltd v Export Credits Guarantee Department* [1974] 2 All ER 889, [1974] 1 WLR 909, HL.

4 *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703. As to subrogation see generally para 195 et seq ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(ii) Special Features of Debt Insurance/793. Duration of insurance.

(ii) Special Features of Debt Insurance

793. Duration of insurance.

Where a policy is effected to cover a creditor against the risk of a debtor's default, it may be that the policy is a species of continuing insurance¹ so that, where by agreement² annual premiums are payable, the policy does not necessarily lapse on the non-payment of a particular premium³. This is the case where, by arrangement between the parties, the annual premium is payable by the debtor; his failure to pay it does not prevent the creditor from recovering under the policy in the event of the non-payment of the debt⁴. Payment of the annual premium within the days of grace⁵ may, however, be expressly made a condition precedent to the insurers' liability⁶, and performance of the condition is not excused by reason of the fact that the risk of non-payment has already become a certainty⁷.

1 *Stuart v Freeman* [1903] 1 KB 47, CA, distinguishing *Pritchard v Merchant's and Tradesman's Life Assurance Society* (1858) 3 CBNS 622.

2 Agreement may be inferred by the conduct of the parties: *Whitehorn v Canadian Guardian Life Insurance Co* (1909) 19 OLR 535.

3 *Phoenix Life Assurance Co v Sheridan* (1860) 8 HL Cas 745; *Stuart v Freeman* [1903] 1 KB 47, CA; cf *McKenna v City Life Assurance Co* [1919] 2 KB 491.

4 *Shaw v Royce Ltd* [1911] 1 Ch 138 at 148 per Warrington J.

5 As to days of grace see PARAS 166-167 ante.

6 *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA.

7 *Employers' Insurance Co of Great Britain v Benton* (1897) 24 R 908, Ct of Sess; cf *Simpson v Mortgage Insurance Corp'n Ltd* (1893) 38 Sol Jo 99, DC.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(ii) Special Features of Debt Insurance/794. Duty to disclose financial position of debtor.

794. Duty to disclose financial position of debtor.

The risk of loss under a policy of debt insurance depends upon the debtor's financial position, and it is a breach of the duty of good faith for a creditor to seek insurance for a debt when he knows or suspects that the debtor will be unable to pay it¹. Unless the insurers are themselves acquainted with the debtor's position² or are put on inquiry, the creditor must disclose any knowledge or suspicion which he may have of the circumstances³. If the insurance is in respect of a surety's liability, the financial position both of the surety⁴ and of the principal debtor⁵ may be material, but the rate of interest and the circumstances of the original loan need not be disclosed⁶.

1 As to non-disclosure and misrepresentation see PARA 36 et seq ante.

2 *Anglo-Californian Bank v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665 at 666.

3 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135 at 147, HL, per Lord Shand; *Moore Large and Co Ltd v Hermes Credit and Guarantee plc* [2003] EWHC 26 (Comm).

4 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL.

5 *Anglo-Californian Bank v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

6 *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL; cf *Anglo-Californian Bank v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(ii) Special Features of Debt Insurance/795. Alteration of risk.

795. Alteration of risk.

A policy of debt insurance usually has an express condition to prohibit giving time to the debtor or making any alteration in the terms of the loan modifying the creditor's rights and remedies without the insurers' consent¹. However, such a condition has no application to an alteration which was within the contemplation of the parties at the time when the contract of insurance was made². In the case of an insurance of debentures, if power is reserved to the debenture holders to sanction any modification or compromise of their rights against the debtor company or its property, and the date of payment is accordingly postponed, the risk that payment may be postponed is within the contemplation of the parties³. Where the creditor does not himself consent to the postponement he is entitled to claim payment under the policy when the original date of payment under his debenture arrives, leaving the insurers to enforce by subrogation his rights as modified against the company⁴. The same principle applies to a scheme of arrangement made binding upon the creditors by statute⁵. On the other hand, if the debenture holders agree to release the company from its liability under the insured debentures and to accept fresh debentures in their place the creditor is bound whether he consents or not; any default in payment is a default under the fresh debentures, which are not insured, and consequently the insurers are not liable⁶.

1 *Finlay v Mexican Investment Corpn* [1897] 1 QB 517. In the case of a mortgage the mortgagee may be prohibited from selling the property for less than the sum insured without the insurers' consent: *Re Law Guarantee Trust and Accident Society Ltd* (1913) 108 LT 830 at 832 per Neville J.

2 *Law Guarantee Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138. As to such an alteration see further PARA 123 ante.

3 *Laird v Securities Insurance Co Ltd* (1895) 22 R 452, Ct of Sess.

4 *Finlay v Mexican Investment Corpn* [1897] 1 QB 517 at 522 per Charles J. As to the insurers' right of subrogation see PARA 797 post.

5 *Dane v Mortgage Insurance Corpn* [1894] 1 QB 54, CA; *Laird v Securities Insurance Co Ltd* (1895) 22 R 452, Ct of Sess.

6 *Shaw v Royce Ltd* [1911] 1 Ch 138.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(ii) Special Features of Debt Insurance/796. Proceedings by insured against debtor.

796. Proceedings by insured against debtor.

Except where the policy of debt insurance so provides, the creditor is not bound to sue the debtor or to enforce his security first. On the occurrence of a default within the meaning of the policy, he may claim payment from the insurers¹. However, the policy may be limited to cover only the deficiency which remains after the creditor has exhausted his remedies against the debtor or his sureties².

¹ *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 61, CA, per Lord Esher MR; and see PARAS 203-205 ante.

² *Murdock v Heath* (1899) 80 LT 50; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA. Where insurers of a debt have reinsured their liability, the creditor is not entitled to the benefit of the reinsurance policy as against the general creditors of the insurers: *Re Law Guarantee Trust and Accident Society, Godson's Claim* [1915] 1 Ch 340.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(ii) Special Features of Debt Insurance/797. Insurers' rights of subrogation and contribution.

797. Insurers' rights of subrogation and contribution.

On payment, the insurers are subrogated to the creditor's rights and remedies against the debtor and his securities¹. By a special term in the policy the insurers may be empowered, upon a claim being made, to call upon the creditor to transfer to them his rights in respect of the debt and securities². In this case it is sufficient if he transfers such rights as he has³. In the case of securities, the doctrine of subrogation applies only where the other securities are intended to be primarily liable for the debt; if the other securities are intended to operate as co-securities with the policy, a case of contribution arises⁴.

1 *Laird v Securities Insurance Co Ltd* (1895) 22 R 452, Ct of Sess; *Dane v Mortgage Insurance Corp* [1894] 1 QB 54, CA; *Parr's Bank v Albert Mines Syndicate* (1900) 5 Com Cas 116. As to subrogation generally see PARAS 195-202 ante.

2 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 61, CA, per Lord Esher MR; *Re Law Guarantee Trust and Accident Society Ltd* (1913) 108 LT 830 at 831-832; *Murdock v Heath* (1899) 80 LT 50 at 51 per Bingham J.

3 *Laird v Securities Insurance Co Ltd* (1895) 22 R 452, Ct of Sess.

4 *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1. As to contribution see generally paras 210-211 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(iii) Distinction between Insurance and Guarantee/798. Intention of the parties as the basis of distinction.

(iii) Distinction between Insurance and Guarantee

798. Intention of the parties as the basis of distinction.

A contract under which insurers undertake to make good losses caused by the default of an employee or a debtor bears a close resemblance to a contract of guarantee¹. However, there is a broad distinction which exists between an insurance and a guarantee². The distinction depends upon the intention of the parties³, and may be summarised as described below⁴.

- 251 (1) Insurance is purely a business contract, and liability is accepted in consideration of a premium based upon an estimate of the risk⁵. In a guarantee, liability is usually accepted on personal grounds and without payment⁶.
- 252 (2) The insurers have no personal knowledge of the risk, and rely entirely upon the information they receive. Consequently, as in the case of other contracts of insurance, they are entitled to a full disclosure of all material facts⁷. In a guarantee the duty of disclosure is less extensive⁸.
- 253 (3) The insurers are not sureties; they undertake to pay not the original debt⁹, but a new debt arising under a contract of indemnity; this may differ from the original debt both in amount and as regards the date of payment¹⁰.
- 254 (4) The insurers have no independent rights against the debtor, but are merely subrogated to the remedies of the insured¹¹, whereas a surety has a direct claim against the debtor¹².

1 As to contracts of guarantee see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

2 See *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 60, CA, per Lord Esher, MR; *American Surety Co of New York v Wrightson* (1910) 103 LT 663 at 665 per Hamilton LJ; *Shaw v Royce Ltd* [1911] 1 Ch 138 at 147 per Warrington J; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1022.

3 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54, CA; and see *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 16-17, [1936] 1 All ER 454 at 458-459, HL; *Kreglinger and Fernau Ltd v Irish National Insurance Co Ltd* [1956] IR 116.

4 For a full discussion of the distinction see *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 792-793, CA, per Romer LJ, which, notwithstanding the reversal of the decision of the Court of Appeal in *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL, remains unaffected as a statement of the law; *Re Denton's Estate*, *Licenses Insurance Corp and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 188, CA, per Vaughan Williams LJ.

5 *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ (and see note 4 supra).

6 *Lee v Jones* (1864) 17 CBNS 482 at 503, Ex Ch, per Blackburn J.

7 *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ (and see note 4 supra). As to non-disclosure and misrepresentation see generally para 36 et seq ante.

8 *North British Insurance Co v Lloyd* (1854) 10 Exch 523, approved in *Lee v Jones* (1864) 17 CBNS 482, Ex Ch; *Re Denton's Licenses Insurance Corp and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1036-1042.

9 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 60, CA, per Lord Esher MR.

10 *Dane v Mortgage Insurance Corpn* [1894] 1 QB 54, CA; *Finlay v Mexican Investment Corpn* [1897] 1 QB 517 at 522 per Charles J; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 630, CA, per Buckley LJ.

11 As to subrogation see PARAS 195-202 ante.

12 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1147 et seq. In insurance the insurers are not able to control the occurrence of the event insured against, whereas a guarantor is supposed to undertake that the principal debtor will meet his obligation and is under a duty to see that he does: *Wright v Simpson* (1802) 6 Ves 714 at 734; *Re Lockett* (1845) 1 Ph 509 at 511.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(3) DEBT INSURANCE/(iii) Distinction between Insurance and Guarantee/799. Evidence of intention.

799. Evidence of intention.

The fact that a contract is framed in the form of a policy is some evidence of the parties' intention that it should be a contract of insurance, rather than a contract of guarantee¹. However, the form of contract is not conclusive². A contract which is in form a guarantee may in effect be a contract of insurance, and a contract expressed in the form of a policy may nevertheless be a guarantee³. It is possible that many contracts may with equal propriety be called either contracts of insurance or guarantees⁴, and in many cases it is immaterial to which of the two classes the particular contract belongs⁵.

1 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54, CA.

2 See *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 16-17, [1936] 1 All ER 454 at 458-459, HL.

3 *Re Denton's Estate, Licenses Insurance Corp and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 631, CA, per Buckley LJ. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1022, 1067.

4 *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ; revsd, without affecting this point, sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL.

5 *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 at 62, CA, per Kay J, followed in *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 636, CA, per Kennedy LJ; *Seaton v Burnand, Burnand v Seaton* [1900] AC 135 at 148, HL, per Lord Robertson; cf *Shaw v Royce Ltd* [1911] 1 Ch 138 at 147 per Warrington J.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(4) CONSEQUENTIAL LOSS INSURANCE/800. Purpose of consequential loss insurance.

(4) CONSEQUENTIAL LOSS INSURANCE

800. Purpose of consequential loss insurance.

Consequential loss insurance was devised for the purpose of giving protection to the insured against losses which, although consequent upon the loss of his property by a peril insured against, such as fire, are not recoverable under an ordinary form of policy¹. Usually, the losses contemplated are the losses which flow from the interruption of the insured's business by reason of a fire which destroys or damages the premises on which the business is carried on². In such a case, therefore, a claim under a consequential loss policy necessarily assumes that the premises have been so destroyed or damaged³. Consequential loss insurance may also be taken out in respect of non-physical risks, for example loss caused by the cancellation of a sporting event where the cause of the cancellation is an insured peril⁴.

1 *Re Wright and Pole* (1834) 1 Ad & El 621.

2 See eg *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] 2 All ER 487, [1996] 1 Lloyd's Rep 614, CA.

3 *Waterkeyn v Eagle, Star and British Dominions Insurance Co* (1920) 5 Ll L Rep 42; cf *R v British Columbia Fir and Cedar Lumber Co Ltd* [1932] AC 441 at 447, PC. This form of insurance has, however, been extended to profit-earning goods, such as lorries, which can be effectively put out of commission by many causes other than fire, and to goods and merchandise which may be destroyed elsewhere than on the insured's premises.

4 *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(4) CONSEQUENTIAL LOSS INSURANCE/801. Insurance in respect of loss of profits.

801. Insurance in respect of loss of profits.

Profits are insured only if they are specifically described as such¹ and are usually net profits². Insurance on goods merely covers the value of the goods³ and insurance on a building covers no more than the fabric of the building⁴. If profits are insured, a valued policy may be used⁵; the policy normally contains provisions prescribing the standard for measuring the loss of profits and the method of ascertaining the amount to be paid⁶. If, during negotiations for insurance against an overall loss of profit, a proposer is carrying on business at a loss, this may be a material fact to be disclosed to the insurers⁷.

1 *Maurice v Goldsborough Mort & Co Ltd* [1939] AC 452 at 461, [1939] 3 All ER 63 at 67, PC, per Lord Wright, citing *Lucena v Craufurd* (1806) 2 Bos & PNR 269, HL; *Mackenzie v Whitworth* (1875) 1 Ex D 36 at 43; see also *Stockdale v Dunlop* (1840) 6 M & W 224 at 232-233 per Parke B; *Lewis Emanuel & Son Ltd v Hepburn* [1960] 1 Lloyd's Rep 304 (the words 'physical loss or damage or deterioration caused by strikes' did not cover loss of market); *De Meza and Stuart v Apple Van Straten, Shena and Stone* [1975] 1 Lloyd's Rep 498, CA.

2 The policy moneys are, therefore, liable to income tax: *R v British Columbia Fir and Cedar Lumber Co Ltd* [1932] AC 441, PC, following *J Glicksten & Son Ltd v Green* [1929] AC 381.

3 *Maurice v Goldsborough Mort & Co Ltd* [1939] AC 452, [1939] 3 All ER 63, PC (a loss in value of goods carried by the loss of other goods in the same consignment is not covered); *Cator v Great Western Insurance Co of New York* (1873) LR 8 CP 552.

4 *Re Wright and Pole* (1834) 1 Ad & El 621.

5 See eg *City Tailors Ltd v Evans* (1921) 126 LT 439, CA; cf *Beauchamp v Faber* (1898) 3 Com Cas 308. As to valued policies see PARA 4 ante.

6 See *Recher & Co v North British and Mercantile Insurance Co* [1915] 3 KB 277, DC; *Brunton v Marshall* (1922) 10 Ll L Rep 689; *Plummer Hat Co Ltd v British Trading Insurance Co Ltd* [1932] NZLR 576, NZ SC.

7 *Stavers v Mountain* (1912) Times, 27 July, CA (the question of materiality ought to have been left to the jury); *Polikoff Ltd v North British and Mercantile Insurance Co Ltd* (1936) 55 Ll L Rep 279; *Plummer Hat Co Ltd v British Trading Insurance Co Ltd* [1932] NZLR 576, NZ SC. It does not follow that a general overall loss must be disclosed if the proposer, in an insurance on property such as an individual factory building, seeks to insure its income-bearing capacity.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(4) CONSEQUENTIAL LOSS INSURANCE/802. Insurance in respect of standing charges.

802. Insurance in respect of standing charges.

In every business there are certain items of expenditure such as rent, rates and taxes, salaries and debenture interest which are payable in the ordinary course out of the earnings of the business, but which continue to be payable notwithstanding the peril insured against occurring interrupting the business and the consequent cessation or diminution of its earning capacity¹. Where standing charges are intended to be covered they must be specified in the policy, and they are covered to the extent only to which they would have been earned if the peril insured against had not occurred². Generally, such charges are constant in amount, but provision is made for credit to be given if they cease to be payable or are reduced³.

1 *Mount Royal Assurance Co v Cameron Lumber Co Ltd* [1934] AC 313, PC (jury was held entitled, in estimating the probable earnings, to adopt an arbitrary method of valuation widely recognised in the industry).

2 *Plummer Hat Co Ltd v British Trading Insurance Co Ltd* [1932] NZLR 576, NZ SC; *Mount Royal Assurance Co v Cameron Lumber Co Ltd* [1934] AC 313, PC.

3 *City Tailors Ltd v Evans* (1921) 126 LT 439, CA; *Brunton v Marshall* (1922) 10 Ll L Rep 689.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(4) CONSEQUENTIAL LOSS INSURANCE/803. Insurance in respect of loss of rent.

803. Insurance in respect of loss of rent.

An ordinary policy on buildings may contain a rent clause protecting the insured from the pecuniary loss which he may sustain: (1) if he is a tenant, by reason of his continuing liability to pay rent after the destruction of, or damage to the buildings¹; or (2) if he is a landlord, by reason of the suspension of rent, pending reinstatement, where the tenancy agreement so provides. Under the normal rent clause no liability attaches to the insurers unless the premises become unoccupied, and the extent of their liability is governed by the length of the period for which they continue to be unoccupied².

¹ See eg *Matthey v Curling* [1922] 2 AC 180, HL. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 275.

² *Buchanan v Liverpool and London and Globe Insurance Co* (1884) 11 R 1032, Ct of Sess.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(4) CONSEQUENTIAL LOSS INSURANCE/804. Insurance in respect of increased cost of working.

804. Insurance in respect of increased cost of working.

Insurance may be effected to cover any additional expenditure incurred for the purpose of keeping the business going during the period required for reinstatement, such as the extra cost of labour or materials¹. Other forms of policy may be effected to cover the increased cost of reinstatement where, owing to a rise in prices or the expense of new materials, the cost of reinstatement exceeds the value of the subject matter at the time of the loss.

¹ This includes the cost of partly manufactured goods if bought for the purpose of keeping the business going: *Henry Booth & Sons v Commercial Union Assurance Co* (1922) 14 Ll L Rep 114.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(5) LEGAL EXPENSES INSURANCE/805. Nature of legal expenses insurance.

(5) LEGAL EXPENSES INSURANCE

805. Nature of legal expenses insurance.

Legal expenses insurance protects the insured against the risk of an adverse costs award in the event that he becomes involved in litigation¹. Legal expenses insurance may be 'before the event' or 'after the event'. Before the event insurance has been marketed for some time, and is taken out at a time when there are no proceedings in prospect: it often forms a part of some wider cover, eg, householder's insurance. After the event insurance, by contrast, is of very recent origin and is taken out after a dispute has arisen, protecting the insured against costs liability in specific proceedings. Legal expenses insurance is a separate class of contract of general insurance for authorisation purposes².

1 As to the award of costs in litigation see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt 1 para 17; and see PARAS 21-22 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(5) LEGAL EXPENSES INSURANCE/806. Before the event insurance.

806. Before the event insurance.

A before the event legal expenses policy allows the insured to recover the costs of litigation. The policy will generally provide that the insured must have a reasonable prospect of success in the proceedings, and some policies require the case to be assessed by counsel to determine the likelihood of a successful outcome. Before the event policies are regulated by the Insurance Companies (Legal Expenses Insurance) Regulations 1990¹, the purpose of regulation being to ensure that there is no conflict of interest where the same insurer is both the legal expenses insurer of a claimant to proceedings and the liability insurer of the defendant in the same proceedings, as there may be a temptation for the insurer to refuse to support the claimant's action even though it has a strong prospect of success.

The regulations apply to all legal expenses insurance business except²: (1) legal expenses insurance contracts concerning disputes or risks arising out of, or in connection with, the use of seagoing vessels³; (2) anything done by a person providing civil liability cover for the purpose of defending or representing the assured in an inquiry or proceedings which is at the same time done in the insurer's own interest under such cover⁴; and (3) legal expenses cover provided by an assistance insurer under a contract the principal object of which is the provision of assistance to persons who fall into difficulties while travelling, while away from home or while away from their permanent residence and where the costs are incurred outside the state in which the assured normally resides. In such a case the policy must clearly state that the cover in question is limited to these circumstances and is ancillary to that assistance⁵. Legal expenses cover must be contained in a separate policy⁶ or, where that cover is provided under a policy relating to one or more other classes of general insurance business⁷, a separate section of the policy relating to that cover only⁸ and specifying the nature of that cover⁹.

An insurance company¹⁰ carrying on legal expenses insurance business must adopt at least one of the following arrangements¹¹:

- 255 (a) The company must ensure that no member of staff who is concerned with the management of claims under legal expenses insurance contracts, or with legal advice in respect of such claims, carries on at the same time any similar activity (i) in relation to another class of general insurance business carried on by the company¹²; or (ii) in any other insurance company, having financial, commercial or administrative links with the first company, which carries on one or more other classes of general insurance business¹³.
- 256 (b) The company must entrust the management of claims under legal expenses insurance contracts to an undertaking having separate legal personality, which must be mentioned in the separate policy or section required¹⁴.
- 257 (c) The company must, in the policy, afford the insured the right to entrust the defence of his interests, from the moment that he has the right to claim from the insurer under the policy, to a lawyer of his choice or, to the extent that the law of the relevant forum so permits, to any other appropriately qualified person¹⁵.

Where under a legal expenses insurance contract recourse is had to a lawyer, or other person having such qualifications as may be necessary, to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured must be free to choose that lawyer, or other person¹⁶. The insured must also be free to choose a lawyer, or other person, to serve his interests whenever a conflict of interests arises¹⁷. These rights must be expressly recognised in

the policy¹⁸. Any dispute between the insurer and insured arising out of a legal expenses insurance contract may be referred to arbitration¹⁹ and the policy must mention the right of the insured to have recourse to arbitration²⁰.

Before the event insurance is first party rather than liability cover even though its purpose is to insure the insured against liability for potential liability for the costs of bringing or defending proceedings. The Third Parties (Rights against Insurers) Act 1930 thus does not apply to before the event insurance, so that if the insured has appointed solicitors to pursue his claim, and then becomes insolvent leaving their fees unpaid, the solicitors cannot proceed against the before the event insurers²¹.

1 I.e. the Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, implementing EC Council Directive 87/344 (OJ L185, 4.7.87, p 77). Breach by an insurance company of the regulations is treated as if it were a contravention of a requirement imposed on it by or under the Financial Services and Markets Act 2000, and Part XIV (ss 205-211) applies in the event of any such breach: Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 11; see further FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 465 et seq.

2 Ibid reg 3(1). 'Legal expenses insurance business' means the business of effecting or carrying out contracts of insurance, other than contracts of reinsurance, which insure against a risk arising from legal expense: reg 2(1)(c) (substituted by SI 2001/3649). The definition of 'legal expenses insurance business' must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (as to which see PARAS 22, 25 ante): Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 2(2) (as so substituted).

3 Ibid reg 3(2).

4 Ibid reg 3(3).

5 Ibid reg 3(4).

6 See ibid reg 4(a).

7 'General insurance business' means the business of effecting or carrying out of contracts of general insurance: ibid reg 2(1)(a) (substituted by SI 2001/3649); and see note 2 supra.

8 Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 4(b).

9 Ibid reg 4.

10 'Insurance company' means (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV to effect or carry out contracts of insurance; (2) an EEA firm of the kind mentioned in Sch 3 para 5(d) with permission under Sch 3 para 15, as a result of qualifying for authorisation under Sch 3 para 12, to effect and carry out contracts of insurance; or (3) any other person who may effect or carry out contracts of insurance without contravening the prohibition imposed by s 19: Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 2(1)(b) (substituted by SI 2001/3649); and see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 80 et seq.

11 Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 5(1).

12 Ibid reg 5(2)(a).

13 Ibid reg 5(2)(b).

14 I.e. under ibid reg 4 (see text and notes 6-9 supra): reg 5(3). If that undertaking has financial, commercial or administrative links with another insurance company which carries on one or more other classes of general insurance business, members of the staff of the undertaking who are concerned with the processing of claims, or with providing legal advice connected with such processing, must not pursue the same or a similar activity in that other insurance company at the same time: reg 5(3).

15 Ibid reg 5(4). 'Lawyer' means a person entitled to pursue his professional activities under one of the denominations laid down by EC Council Directive 77/249 (OJ L078, 26.3.77, p 17): Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 2(1)(d) (amended by SI 2001/3649).

16 Insurance Companies (Legal Expenses Insurance) Regulations 1990, SI 1990/1159, reg 6(1).

17 Ibid reg 6(2). Where a conflict of interests arises or there is disagreement over the settlement of a dispute between the insurer and insured under a legal expenses insurance contract, the insurer must give written notice to the insured informing him of the right referred to in reg 6(2), and the possibility of having recourse to arbitration (see the text and note 19 *infra*): reg 9(1). Where the management of claims is entrusted to a separate undertaking as mentioned in reg 5(3) (see the text and note 14 *supra*) the duty of the insurer is to make arrangements to secure that such notice is given by that undertaking: reg 9(2).

18 Ibid reg 6(3). Regulation 6 does not apply where (1) the legal expenses cover is limited to risks arising from the use of a road vehicle in the United Kingdom and is connected with a contract to provide assistance in the event of accident or breakdown involving a road vehicle; (2) neither the legal expenses insurer nor the assistance insurer carries on any class of liability insurance business; and (3) there are arrangements for securing that, where the parties to a dispute are insured in respect of legal expenses by the same insurer, legal advice and representation are provided for each of them by completely independent lawyers: reg 7.

19 Ibid reg 8(1).

20 Ibid reg 8(2).

21 *Tarbuck v Avon Insurance plc* [2001] 2 All ER 503, [2001] All ER (Comm) 422. As to the Third Parties (Rights against Insurers) Act 1930 see *PARAS* 678-684 *ante*.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/11. PECUNIARY LOSS INSURANCE/(5) LEGAL EXPENSES INSURANCE/807. After the event insurance.

807. After the event insurance.

After the event insurance has developed since the abolition of legal aid for civil actions, and provides a mechanism for the claimant to bring an action in the knowledge that, if the action is unsuccessful or if costs are otherwise not recoverable, the costs awarded against the insured will be paid by the after the event insurers¹. In practice the claimant will, when instructing solicitors in respect of his claim, be advised by them whether it is appropriate to take out after the event cover and the arrangements will be made by them. It is likely that after the event insurance will be available only where the insured has a better than 50 per cent chance of succeeding with his claim.

If the insured is successful in his action and is awarded costs, then the after the event policy will not be called upon to respond. However, a question has arisen as to whether any costs order made in favour of the insured may include the amount of the after the event premium, as this may in some cases be significantly greater than the amount of the claim itself. The Access to Justice Act 1999 provides that where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy². The rules of the court give the court a discretion as to the award of costs and in exercising its discretion the court will have regard to whether those costs, including any premium, were reasonably incurred³.

In the first place, it must have been reasonable for the insured to insure in the first place. What is reasonable in these circumstances has been the subject of a number of decisions in test cases, for the most part involving small claims for personal injury⁴. Those cases have decided that: (1) it is reasonable for the insured to take out an after the event policy before the defendant in the proceedings has indicated whether or not they will be contested, although it becomes unreasonable to insure if there are no real live issues between the parties; (2) it is reasonable for the insured to take out an after the event policy at a late stage in the proceedings if it can be shown that cover was unavailable either at all or at a reasonable premium at any earlier stage; and (3) it is unreasonable to insure if the insured has access to a before the event policy⁵. Secondly, even if it is reasonable to insure, the premium must be a reasonable one. The courts have for the time being accepted that the insured is able to recover the full amount of a premium which has been assessed on a block-rated basis, without differentiation between a claim which has a 51 per cent chance of success and a claim which has a 99 per cent chance of success.

The insured is in any event only able to recover those parts of the sum paid by him to insurers which can properly be described as 'premium'. This word is defined as meaning 'a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim'⁶. The term has been held to cover sums paid to the underwriters, sums paid to agents by way of commission and sums covering claims-handling expenses, but to exclude the cost of the provision of ancillary services by agents⁷.

1 As to the award of costs in litigation see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

2 Access to Justice Act 1999 s 29.

3 See CPR Pts 43, 44; and CIVIL PROCEDURE vol 12 (2009) PARA 1734.

4 *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142 (both affd in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000); *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2001] 1 WLR 125; *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775, [2002] 1 WLR 2450; *Ashworth v Peterborough United Football Club* (10 June 2002, unreported); *Re Claims Direct Test Cases* [2003] EWCA Civ 136.

5 As to before the event policies see PARA 806 ante.

6 CPR 43.2(1)(m).

7 *Re Claims Direct Test Cases* [2003] EWCA Civ 136.

UPDATE

807 After the event insurance

NOTE 7--See *Sharratt v London Central Bus Co (No 2)*, *The Accident Group Test Cases* [2004] EWCA Civ 575, [2004] 3 All ER 325.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(i) Restriction of Advertisements/808. Circulars and advertisements controlled.

12. WAR RISKS AND ACTS OF TERRORISM

(1) WAR RISKS

(i) Restriction of Advertisements

808. Circulars and advertisements controlled.

It is an offence¹:

- 258 (1) to distribute or cause to be distributed any circulars inviting persons to insure any property in the United Kingdom² in which they are interested against war risks³, or containing information calculated to lead the recipient to insure such property against war risks⁴;
- 259 (2) to be in possession for the purpose of distribution of any circulars of such a nature as to show that the object or principal object of distribution would be to communicate such an invitation or such information⁵; or
- 260 (3) to cause or permit the appearance of any advertisement containing such an invitation or such information⁶,

unless permission for the distribution of the circular, or the appearance of the advertisement, has been granted by the Treasury⁷, and any conditions imposed by them in relation to the circular or advertisement have been complied with⁸. For this purpose documents are not deemed to be other than circulars by reason only of the fact that they are in the form of a newspaper, journal, magazine or other periodical publication⁹.

1 As to penalties and proceedings see PARA 811 post.

2 A reference to the insuring of any property by any person includes a reference to the making of a contract or arrangement (not being a contract of sale or bailment of that property), under which, in the event of damage to the property, he is entitled or eligible, absolutely or conditionally, to or for any form of indemnification, total or partial, and whether by way of a money payment or not, in respect of that damage: Restriction of Advertisement (War Risks Insurance) Act 1939 s 6(1)(b). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

3 Ibid s 1(1)(a)(i). 'War risks' means risks arising from action taken by an enemy or from action taken in combating an enemy or repelling an imagined attack by an enemy: s 6(1)(a).

4 Ibid s 1(1)(a)(ii).

5 Ibid s 1(1)(b).

6 Ibid s 1(1)(c).

7 Every application for permission to issue a circular or advertisement must be referred by the Treasury to an advisory committee appointed by them, consisting of such persons as they think fit: ibid s 3(1), (2) (both amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781). The Treasury may not grant permission except (1) on the recommendation of the committee; or (2) where the committee recommends the granting of permission subject to requirements or conditions, without imposing such conditions or requirements: Restriction of Advertisement (War Risks Insurance) Act 1939 s 3(2)(a), (b). However, this provision does not limit the discretion of the Treasury to refuse altogether to grant the permission or to impose further conditions

or requirements: s 3(2) (as so amended). The committee may not recommend the granting of permission unless, having regard to all relevant circumstances and particularly the nature and situation of the property proposed to be eligible for insurance and the classes of persons to be invited to insure, it is satisfied that such grant, subject to any conditions or requirements included in the committee's recommendations, would not be contrary to the public interest: s 3(3). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

8 Ibid s 1(1) (amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Sch Pt II para 95).

9 Ibid s 6(2). A person is not to be taken to contravene the Act merely by distributing or causing to be distributed to purchasers, or having in his possession for the purpose of distribution to purchasers, copies of any newspaper, journal, magazine or other periodical publication of which he is not the publisher: s 6(2).

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809. Savings.

The restriction on the distribution of circulars and the issue of advertisements relating to war risks¹ does not render unlawful:

- 261 (1) anything done with a view to inducing persons to enter into a contract of insurance if the Secretary of State could lawfully reinsure the person liable under that contract²; or
 - 262 (2) anything done with a view to inducing persons to enter into any contract of insurance:
- 15
- 16. (a) of goods consigned for carriage by sea or air from a place outside the United Kingdom³ to a place in the United Kingdom, while the goods are in transit between the ship or aircraft and their destination⁴; or
 - 17. (b) of goods consigned for carriage by sea or air from a place in the United Kingdom to a place outside the United Kingdom, while the goods are in transit between the premises from which they are consigned and the ship or aircraft⁵.
- 16

1 As to this restriction, and for the meaning of 'war risks', see PARA 808 ante.

2 I.e. under the Marine and Aviation Insurance (War Risks) Act 1952 s 1 (see PARA 812 post): Restriction of Advertisement (War Risks Insurance) Act 1939 s 1(2)(b) (amended by the Marine and Aviation Insurance (War Risks) Act 1952 s 8; and the Transfer of Functions (Sea Transport, etc) Order 1968, SI 1968/2038, art 4(1)(a)). The Secretary of State concerned is the Secretary of State for Trade and Industry.

3 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

4 Restriction of Advertisement (War Risks Insurance) Act 1939 s 1(2)(c)(i).

5 Ibid s 1(2)(c)(ii).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(i) Restriction of Advertisements/810. Imposition of requirements.

810. Imposition of requirements.

Where permission is granted for the distribution of any circulars, or the appearance of any advertisement, inviting insurance against war risks¹, the Treasury² may, in addition to imposing conditions as to such distribution or appearance³, by order specify requirements⁴ designed to secure that any representation in the circular or advertisement is complied with⁵. If the persons to whom the permission is granted avail themselves of it, such requirements must be complied with by every person concerned in carrying on the business in connection with which the circulars are to be distributed or the advertisement is to appear⁶.

If the Treasury thinks fit, the requirements which may be imposed include requirements as to:

- 263 (1) the total or partial separation of the funds respectively available for the payment of claims and the payment of expenses⁷;
- 264 (2) the proportion of premiums or similar payments which is to be allocated to the payments of claims⁸;
- 265 (3) the manner in which any fund available for the payment of claims is to be maintained and dealt with⁹; and
- 266 (4) the keeping, drawing up, auditing and publication of accounts¹⁰.

1 As to circulars and advertisements which are controlled, and for the meaning of 'war risks', see PARA 808 ante.

2 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

3 See PARA 808 ante.

4 The Treasury must impose any requirements recommended by the advisory committee: see PARA 808 note 7 ante.

5 Restriction of Advertisement (War Risks Insurance) Act 1939 s 2(1) (s 2(1), (2) amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Sch Pt II para 95).

6 Restriction of Advertisement (War Risks Insurance) Act 1939 s 2(1), (2) (both as amended: see note 5 supra). Except in so far as the Treasury dispenses with compliance with any requirement, non-compliance by any person concerned in carrying on the business is an offence: s 2(2) (as so amended). For penalties for offences see PARA 811 post.

7 Ibid s 2(1)(a).

8 Ibid s 2(1)(b).

9 Ibid s 2(1)(c).

10 Ibid s 2(1)(d).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(i) Restriction of Advertisements/811. Penalties and proceedings.

811. Penalties and proceedings.

A person who commits an offence under the Restriction of Advertisement (War Risks Insurance) Act 1939¹ is liable on summary conviction to a fine not exceeding the prescribed sum or to imprisonment for a period not exceeding three months, or both², and on conviction on indictment to a fine or to imprisonment for a period not exceeding two years, or both³. Where an offence under the Act committed by a body corporate is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the body corporate, he, as well as the body corporate, is deemed to be guilty of the offence and is liable to be proceeded against and punished accordingly⁴.

No prosecution in respect of an offence under the Act may be instituted otherwise than with the consent of the Treasury⁵.

1 See PARAS 808, 810 note 6 ante.

2 Restriction of Advertisement (War Risks Insurance) Act 1939 s 4(1)(a) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). The 'prescribed sum' means £5000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

3 Restriction of Advertisement (War Risks Insurance) Act 1939 s 4(1)(b).

4 Ibid s 4(2).

5 Ibid s 4(3) (amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Sch Pt II para 95). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(ii) Insurance of Ships, Aircraft and Cargoes/A. REINSURANCE BY THE SECRETARY OF STATE/812. Power to enter into reinsurance agreements.

(ii) Insurance of Ships, Aircraft and Cargoes

A. REINSURANCE BY THE SECRETARY OF STATE

812. Power to enter into reinsurance agreements.

The Secretary of State¹ may with the approval of the Treasury make agreements with any authorities or persons whereby he undertakes the liability of reinsuring any war risks² against which a ship or aircraft³, or the cargo carried in a ship or aircraft, is for the time being insured⁴. However, he may not enter into an agreement for the reinsurance of any war risks against which a ship or aircraft which is not a British ship⁵ or British aircraft⁶ is for the time being insured, except in so far as they arise during the continuance of any war or other hostilities in which Her Majesty is engaged, or arise after such war or hostilities in consequence of things done or omitted during the continuance of such war or hostilities⁷. A copy of every agreement for reinsurance made by the Secretary of State must be laid before both Houses of Parliament as soon as may be after it is made, and if either House, within the period of 14 days⁸ beginning with the day on which a copy is laid before it, resolves that the agreement be annulled, it then becomes void except in so far as it confers rights or imposes obligations in respect of things previously done or omitted, but without prejudice to the making of a new agreement⁹.

1 The Secretary of State concerned is the Secretary of State for Trade and Industry.

2 'War risks' means risks arising from hostilities, rebellion, revolution and civil war, civil strife consequent on the happening of any of those events, or action taken (whether before or after the outbreak of any hostilities, rebellion, revolution or civil war) for repelling an imagined attack or preventing or hindering the carrying out of any attack, and includes piracy: Marine and Aviation Insurance (War Risks) Act 1952 s 10(1). As to pirates see PARA 340 ante.

3 A reference to a ship or aircraft is for this purpose construed as including any machinery, tackle, furniture or equipment of the ship or aircraft and any goods on board the ship or aircraft other than cargo carried in it: *ibid* s 1(3). 'Goods' includes currency and bearer securities, not being bills of exchange or promissory notes: s 10(1).

4 *Ibid* s 1(1)(a), (b).

5 As to the ships which may be included in the central register of British ships see now the Merchant Shipping Act 1995; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 254 et seq. The provisions of the Marine and Aviation Insurance (War Risks) Act 1952 relating to British ships apply also to ships of India and ships of the Republic of Ireland, and references in the Act to British ships must be construed accordingly: s 10(2).

6 'British aircraft' means aircraft registered in Her Majesty's dominions: *ibid* s 10(1). The provisions of the Act also apply to aircraft registered in India, the Republic of Ireland, the Federation of Malaya, a protectorate, a protected state, a trust territory or a mandated territory, and references in the Act to British aircraft must be construed accordingly: s 10(3), which further provides that the references to a protectorate, a protected state, a trust territory and a mandated territory are to be construed as if they were contained in the British Nationality Act 1948 (repealed). These terms are now obsolete: see generally COMMONWEALTH.

7 Marine and Aviation Insurance (War Risks) Act 1952 s 1(1) proviso. Under s 7 (as amended) agreements made under s 1 are exempt from the operation of the Marine Insurance Act 1906: see PARA 815 post.

8 In reckoning the period of 14 days no account is taken of any period during which Parliament is dissolved or prorogued or both Houses are adjourned for more than 4 days: Marine and Aviation Insurance (War Risks) Act 1952 s 1(2).

9 Ibid s 1(2).

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813. Liabilities of reinsurance on insolvency of insurer.

Where, in respect of any loss or damage arising from a war risk¹ against which an insured has been insured, either originally or by way of reinsurance, a sum has become payable to the insurer either:

- 267 (1) by the Secretary of State by virtue of a reinsurance agreement made under the Marine and Aviation Insurance (War Risks) Act 1952²; or
- 268 (2) under a contract of insurance by some intermediate insurer who has reinsured the risk with the Secretary of State under such an agreement³,

then if before payment of the sum is made by the Secretary of State or the intermediate insurer the insurer becomes insolvent⁴, the sum ceases to be payable to the insurer and becomes payable by the Secretary of State or the intermediate insurer, as the case may be, to the insured, and the right of the insured to receive payment from the insurer in respect of the loss or damage is extinguished to the extent that the risk was reinsured by the Secretary of State⁵.

1 For the meaning of 'war risk' see PARA 812 note 2 ante.

2 I.e. the Marine and Aviation Insurance (War Risks) Act 1952 s 1 (see PARA 812 ante): s 4(a). As to the Secretary of State see PARA 812 note 1 ante.

3 Ibid s 4(b).

4 I.e. if the insurer becomes bankrupt or, where the insurer is a company, the company commences to be wound up or a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge or possession is taken by or on behalf of the holders of such debentures of any property comprised in or subject to the charge: *ibid* s 4. As to floating charges see COMPANIES vol 15 (2009) PARA 1269 et seq.

5 Ibid s 4. In the case of other reinsurances of marine risks the insured has no right or interest in respect of the reinsurance unless the policy so provides: see the Marine Insurance Act 1906 s 9(2); and PARA 766 text and notes 6-7 ante.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(ii) Insurance of Ships, Aircraft and Cargoes/B. INSURANCE BY THE SECRETARY OF STATE/814. Power to carry on insurance business.

B. INSURANCE BY THE SECRETARY OF STATE

814. Power to carry on insurance business.

If at any time it appears to the Secretary of State¹ that reasonable and adequate facilities are not available for the insurance of British ships or British aircraft², or for the insurance of cargoes carried in ships or aircraft, against war risks³ or any description of such risks, he may with the approval of the Treasury carry on the business of insuring such ships, aircraft or cargoes against war risks or, as the case may be, the description of war risks in question⁴.

During the continuance of any war or other hostilities in which Her Majesty may be engaged the Secretary of State may with the approval of the Treasury carry on business as an insurer against all risks, of:

- 269 (1) ships and aircraft (whether British or not)⁵; or
- 270 (2) cargoes carried in ships and aircraft⁶; or
- 271 (3) goods⁷ consigned for carriage by sea or air while the goods are in transit between the premises from which they are consigned and the ship or aircraft, or between the ship or aircraft⁸ and their destination⁹,

or may carry on business simultaneously as such as an insurer in all three categories¹⁰. However, the Secretary of State must not, by virtue of any of these three categories, undertake the insurance of a ship, aircraft or cargo against risks other than war risks unless he is satisfied that, in the interests of the defence of the realm or the efficient prosecution of any war or hostilities in which Her Majesty is engaged, it is necessary or expedient to do so¹¹.

1 As to the Secretary of State see PARA 812 note 1 ante. The words 'when it appears' make the Secretary of State the sole judge of whether the facilities available are reasonable and adequate: see *Point of Ayr Collieries Ltd v Lloyd-George* [1943] 2 All ER 546, CA.

2 For the purposes of the Marine and Aviation Insurance (War Risks) Act 1952 s 2(1)(a), and s 2(1) proviso, references to ships and aircraft of any description are construed as including references to any machinery, tackle, furniture or equipment of ships and aircraft of those respective descriptions and to any goods on board ships and aircraft of those respective descriptions not being cargo carried in them: s 2(2). For the meaning of 'goods' see PARA 812 note 3 ante. For the meanings of 'British ships' and 'British aircraft' see PARA 812 notes 5-6 ante.

3 For the meaning of 'war risks' see PARA 812 note 2 ante.

4 Marine and Aviation Insurance (War Risks) Act 1952 s 2(1)(a), (c). The Secretary of State may carry on business under all or any of the categories described in these provisions: s 2(1). Under s 7 (as amended) agreements made under s 1 are exempt from the operation of the Marine Insurance Act 1906: see PARA 815 post.

5 Marine and Aviation Insurance (War Risks) Act 1952 s 2(1)(b); and see the text and note 11 infra.

6 Ibid s 2(1)(d); and see the text and note 11 infra.

7 For transitional provisions as to compensation for goods lost or damaged in transit see PARAS 816-817 post.

8 'Ship or aircraft' here does not include a vessel from which the goods are discharged for the purpose of being carried by sea or air or into which they are discharged for the purpose of being landed: Marine and Aviation Insurance (War Risks) Act 1952 s 2(3).

9 Ibid s 2(1)(e); and see the text and note 11 *infra*.

10 Ibid s 2(1).

11 Ibid s 2(1) proviso.

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C. EXEMPTIONS AS TO FORM OF INSTRUMENTS

815. Saving of instruments from being inadmissible in evidence.

The fact that certain instruments are not embodied in marine policies in accordance with the general statutory requirement¹ does not of itself make the instruments inadmissible in evidence². The instruments are:

- 272 (1) an agreement for reinsurance of war risks made between the Secretary of State and any other authority or person³, and a policy of reinsurance issued by the Secretary of State in pursuance of such an agreement⁴;
- 273 (2) an agreement entered into by a body of persons approved by the Secretary of State⁵ for the reinsurance of a war risk insured by another person which may be reinsured by the Secretary of State, and a policy issued in pursuance of such an agreement, being a policy only for the reinsurance of such a risk⁶; or
- 274 (3) a contract of insurance entered into by the Secretary of State pursuant to his power to insure, whether against war risks or generally⁷, and a policy and certificate of insurance issued by him in connection with any such contract⁸.

1 As to the general statutory requirement see the Marine Insurance Act 1906 s 22; and PARA 220 et seq ante.

2 Marine and Aviation Insurance (War Risks) Act 1952 s 7(1) (amended by the Finance Act 1959 s 37, Sch 8 Pt II).

3 I.e. made under the Marine and Aviation Insurance (War Risks) Act 1952 s 1 (see PARA 812 ante): s 7(1)(a). As to the Secretary of State see PARA 812 note 1 ante. For the meaning of 'war risks' see PARA 812 note 2 ante.

4 Ibid s 7(1)(a).

5 I.e. a body of persons for the time being approved by the Secretary of State for the purpose of the Marine and Aviation Insurance (War Risks) Act 1952, being a body the objects of which are or include the carrying on of business by way of the reinsurance against war risks of cargoes carried in ships and aircraft: s 7(4), applying s 1(1)(b) (see PARA 812 text to notes 1-4 ante).

6 Ibid s 7(1)(b).

7 As to this power see PARA 814 ante.

8 Marine and Aviation Insurance (War Risks) Act 1952 s 7(1)(c).

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D. PROVISION FOR TRANSITIONAL COMPENSATION FOR GOODS IN TRANSIT

816. Power to pay compensation.

The Secretary of State's power to carry on, during the continuance of any war or hostilities in which Her Majesty is engaged, the business of insurance on goods in transit, postulates that difficulty may well have existed, even before the Secretary of State decides to exercise his power, in obtaining insurance particularly against the impending war risks. Accordingly, special transitional provisions were enacted¹ to provide compensation when goods in transit were lost or damaged by a war risk during an interim period when commercial insurance was not obtainable and the state insurance was not available. In order to obtain such transitional compensation a person must satisfy the Secretary of State that the requisite conditions are fulfilled with respect to any goods²; If he does so, the Secretary of State must pay him compensation for loss or damage to the goods³.

The requisite conditions are:

- 275 (1) in the case of goods which have been consigned for carriage by sea or air from a place outside the United Kingdom, the Isle of Man or any of the Channel Islands⁴ to a place in one of those countries (ie goods in process of import), that the goods were:
 - 17
 18. (a) discharged in that country from the ship or aircraft⁵ before the expiration of the period of seven days beginning with such day as the Secretary of State may declare to be the day from which he will, during the continuance of any war or hostilities in which Her Majesty is engaged, carry on the business of insurance of goods in transit⁶;
 19. (b) after the beginning of that day and before the expiration of the appropriate period⁷, lost or damaged in consequence of a war risk, being one which the Secretary of State was on that day prepared to insure under his general power of insuring goods in transit during such war or hostilities⁸;
 20. (c) lost or damaged while in transit between the ship or aircraft and their destination⁹;
 - 18
 - 276 (2) in the case of goods which have been consigned for carriage by sea or air from a place in any one of the countries mentioned above to a place outside that country (ie goods in process of export), that before the expiration of that period of seven days, after the beginning of the declared day, the goods were lost or damaged in consequence of such a war risk while in transit between the premises from which they were consigned and the ship or aircraft¹⁰.

The further requisite conditions, applicable both to goods in process of import and to goods in process of export, are that:

- 277 (i) the goods were not insured against the war risk in consequence of which they were lost or damaged¹¹;

- 278 (ii) the claimant and his agents exercised all due diligence for securing that no delay occurred while the goods were in transit¹²; and
 279 (iii) the property in the goods was vested in the claimant when the loss or damage occurred¹³.

1 See the Marine and Aviation Insurance (War Risks) Act 1952 s 3. As to the Secretary of State see PARA 812 note 1 ante.

2 For the meaning of 'goods' see PARA 812 note 3 ante.

3 See the Marine and Aviation Insurance (War Risks) Act 1952 s 3(1). As to the amount of transitional compensation see PARA 817 post.

4 Ibid s 3(1)(a), (4). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

5 'Ship or aircraft' does not include a vessel into which the goods are discharged at a port or place in the country in question for the purpose of being landed at that port or place, or from which the goods are discharged for the purpose of being carried by sea or air from the country in question: ibid s 3(5)(a).

6 Ibid s 3(1)(a)(i). For the Secretary of State's power during the continuance of war or hostilities to carry on the business of insuring goods consigned for carriage by sea or air while the goods are in transit to or from the ship or aircraft see PARA 814 text to notes 7-9 ante.

7 'The appropriate period' means, in a case where the destination of the goods is within the port or place at which they were discharged from the ship or aircraft, the period of 15 days beginning with the day on which they were so discharged, or, in a case where the destination of the goods is outside that port or place, the period of 30 days beginning with the day on which they were so discharged: ibid s 3(5)(b).

8 Ibid s 3(1)(a)(ii).

9 Ibid s 3(1)(a)(iii).

10 Ibid s 3(1)(a).

11 Ibid s 3(1)(b).

12 Ibid s 3(1)(c).

13 Ibid s 3(1)(d).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(ii) Insurance of Ships, Aircraft and Cargoes/D. PROVISION FOR TRANSITIONAL COMPENSATION FOR GOODS IN TRANSIT/817. Amount of transitional compensation.

817. Amount of transitional compensation.

The amount of the compensation payable by the Secretary of State under the Marine and Aviation Insurance (War Risks) Act 1952¹ is:

- 280 (1) in the case of lost goods, their insurable value²;
- 281 (2) in the case of damaged goods which have been delivered at their destination, an amount equal to such proportion of their insurable value as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value³;
- 282 (3) in the case of damaged goods which have not been so delivered, an amount equal to such proportion of their insurable value as the difference between the gross sound and damaged values at the place from which they were consigned bears to the gross sound value⁴.

Where, at the time of the loss or damage for which compensation in respect of any goods has become payable under the provisions for transitional compensation, the goods were subject to a mortgage, charge or other similar obligation, the amount of the compensation is deemed to be comprised in the mortgage, charge or obligation⁵.

1 As to the power of the Secretary of State to award transitional compensation under the Marine and Aviation Insurance (War Risks) Act 1952 see s 3; and PARA 816 ante. As to the Secretary of State see PARA 812 note 1 ante.

2 Ibid s 3(2)(a). 'Insurable value' means the prime cost of the goods plus the expenses of and incidental to the carriage of the goods by sea or air and the charges of insurance on the whole: s 3(5)(c).

3 Ibid s 3(2)(b)(i). The gross value of goods for this purpose is their wholesale price, or, if there is none, their estimated value, plus, in either case, the expenses of and incidental to the carriage of the goods: s 3(5).

4 Ibid s 3(2)(b)(ii); and see note 3 supra.

5 Ibid s 3(3).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(ii) Insurance of Ships, Aircraft and Cargoes/E. MARINE AND AVIATION (WAR RISKS) FUND/818. Payments in and out.

E. MARINE AND AVIATION (WAR RISKS) FUND

818. Payments in and out.

All sums received by the Secretary of State¹ under the Marine and Aviation Insurance (War Risks) Act 1952 are payable into a fund under his control called the Marine and Aviation Insurance (War Risks) Fund². All sums required by him for the fulfilment of any of his obligations under that Act must be paid out of that fund³. At any time when a payment falls to be made out of the fund, if the sum standing to the credit of the fund is less than the sum required for making that payment, an amount equal to the deficiency must be paid into the fund out of money provided by Parliament, but if and in so far as that amount is not paid out of such money it is to be charged on and issued out of the Consolidated Fund⁴.

Any amount standing to the credit of the fund at any time, which is in excess of what, in the opinion of the Secretary of State and the Treasury, is likely to be required to meet payments out of the fund, must be paid into the Exchequer⁵.

1 As to the Secretary of State see PARA 812 note 1 ante.

2 Marine and Aviation Insurance (War Risks) Act 1952 s 5(1)(a) (s 5(1) amended by the Statute Law (Repeals) Act 1981).

3 Marine and Aviation Insurance (War Risks) Act 1952 s 5(1)(b) (as amended: see note 2 supra). Any expenses incurred by the Secretary of State for the purposes of the Act which are not required to be defrayed out of the fund must be defrayed out of money provided by Parliament: s 9.

4 Ibid s 5(2) (amended by the Statute Law Revision Act 1963). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

5 Marine and Aviation Insurance (War Risks) Act 1952 s 5(3) (amended by the National Loans Act 1968 s 24(2), Sch 6 Pt I).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(1) WAR RISKS/(ii) Insurance of Ships, Aircraft and Cargoes/E. MARINE AND AVIATION (WAR RISKS) FUND/819. Accounts and audit.

819. Accounts and audit.

An account of the sums paid into and out of the Marine and Aviation Insurance (War Risks) Fund¹ in each financial year must be prepared by the Secretary of State² in such form and manner as the Treasury may direct, and must be transmitted by the Secretary of State to the Comptroller and Auditor General on or before 30 November in each year³. The Comptroller and Auditor General must examine and certify the account and lay copies of the account and of his report on it before both Houses of Parliament⁴, unless the Treasury certifies that, in the interests of the defence of the realm or the efficient prosecution of any war or hostilities in which Her Majesty is engaged, it is inexpedient that copies of the account for any year, and of the report on it, should be laid before Parliament; in such a case, a copy of the certificate must be laid before both Houses of Parliament and, so long as the certificate remains in force, the copies of the account and of the report on it must not be so laid⁵.

1 As to the Marine and Aviation Insurance (War Risks) Fund see PARA 818 ante.

2 As to the Secretary of State see PARA 812 note 1 ante.

3 Marine and Aviation Insurance (War Risks) Act 1952 s 5(4). As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 724.

4 Ibid s 5(4). As to the audit of public accounts generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 716.

5 Ibid s 5(4) proviso.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/12. WAR RISKS AND ACTS OF TERRORISM/(2) ACTS OF TERRORISM/820. Reinsurance by Secretary of State against acts of terrorism.

(2) ACTS OF TERRORISM

820. Reinsurance by Secretary of State against acts of terrorism.

There must be paid out of money provided by Parliament sums necessary to meet the obligations of the Treasury¹ under:

- 283 (1) any reinsurance agreement entered into pursuant to certain arrangements²; or
- 284 (2) any guarantee entered into with such consent pursuant to any such agreement³.

This applies to arrangements under which the Treasury, undertake to any extent the liability of reinsuring risks against:

- 285 (a) loss of or damage to property in Great Britain resulting from or consequential on acts of terrorism⁴; and
- 286 (b) any loss which is consequential on such loss or damage⁵.

Any sums received by the Treasury pursuant to any such arrangements must be paid into the Consolidated Fund⁶.

As soon as practicable after entering into an agreement or guarantee the Treasury must lay a copy of it before each House of Parliament⁷.

1 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2 As to the arrangements in question see text and note 4 infra.

3 Reinsurance (Acts of Terrorism) Act 1993 s 1(1) (amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Schedule paras 120-122).

4 'Acts of terrorism' means acts of persons acting on behalf of or in connection with any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any government de jure or de facto: Reinsurance (Acts of Terrorism) Act 1993 s 2(2). 'Organisation' includes any association or combination of persons: s 2(3). For the meanings of 'Great Britain' and 'United Kingdom' see PARA 8 note 3 ante.

5 Ibid s 2(1) (amended by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Schedule paras 120, 121, 123). To the extent that the arrangements relate to events occurring before as well as after an agreement of reinsurance comes into being, the reference in the Reinsurance (Acts of Terrorism) Act 1993 s 1(1) (as amended) (see the text and notes 1-3 supra) to the obligations of the Treasury is to be construed accordingly: s 2(1) (as so amended).

6 Ibid s 1(3) (as amended: see note 3 supra). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

7 Ibid s 1(2) (as amended: see note 3 supra), which also imposed the same obligations with regard to agreements or guarantees already existing, to be carried out as soon as practicable after the commencement of the Act (ie 27 May 1993).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(1) THE FINANCIAL SERVICES AUTHORITY/821. The Financial Services Authority.

13. REGULATION OF INSURANCE COMPANIES

(1) THE FINANCIAL SERVICES AUTHORITY

821. The Financial Services Authority.

The regulation of insurance companies and of the carrying on of insurance business¹ is the responsibility of the Financial Services Authority, which is a body corporate established under the Financial Services and Markets Act 2000². The general functions of the Authority are the making of rules and the preparation and issuing codes under the Act, the giving of general guidance, and the determination of the general policy and principles by reference to which it performs particular functions³. In discharging its general functions the Authority must, so far as is reasonably possible, act in a way which is compatible with its regulatory objectives and which the Authority considers most appropriate for the purpose of meeting those objectives⁴. The regulatory objectives are: (1) market confidence; (2) public awareness; (3) the protection of consumers; and (4) the reduction of financial crime⁵.

1 As to the statutory restrictions on carrying on insurance business see PARA 22 ante; as to the powers of the Authority to authorise the carrying on of insurance business see PARAS 31-35 ante.

2 See the Financial Services and Markets Act 2000 s 1. As to the Financial Services Authority and its functions and powers generally see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4.

3 Ibid s 2(4); see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6.

4 Ibid s 2(1).

5 Ibid s 2(2); see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(2) THE FINANCIAL SERVICES COMPENSATION SCHEME/822. The compensation scheme.

(2) THE FINANCIAL SERVICES COMPENSATION SCHEME

822. The compensation scheme.

The Financial Services Authority¹ must by rules² establish a scheme for compensating persons in cases where relevant persons³ are unable, or are likely to be unable, to satisfy claims against them⁴. The compensation scheme must, in particular, provide for the scheme manager⁵ to assess and pay compensation, in accordance with the scheme, to claimants in respect of claims made in connection with regulated activities⁶ carried on, whether or not with permission⁷, by relevant persons⁸, and to have power to impose levies on authorised persons, or any class of authorised person, for the purpose of meeting its expenses, including in particular expenses incurred, or expected to be incurred, in paying compensation, borrowing or insuring risks⁹.

The compensation scheme may, in particular, make provision

- 287 (1) as to the circumstances in which a relevant person is to be taken to be unable, or likely to be unable, to satisfy claims made against him¹⁰;
- 288 (2) for the establishment of different funds for meeting different kinds of claim¹¹;
- 289 (3) for the imposition of different levies in different cases¹²;
- 290 (4) limiting the levy payable by a person in respect of a specified period¹³;
- 291 (5) for repayment of the whole or part of a levy in specified circumstances¹⁴;
- 292 (6) for a claim to be entertained only if it is made by a specified kind of claimant¹⁵;
- 293 (7) for a claim to be entertained only if it falls within a specified kind of claim¹⁶;
- 294 (8) as to the procedure to be followed in making a claim¹⁷;
- 295 (9) for the making of interim payments before a claim is finally determined¹⁸;
- 296 (10) limiting the amount payable on a claim to a specified maximum amount or a maximum amount calculated in a specified manner¹⁹;
- 297 (11) for payment to be made, in specified circumstances, to a person other than the claimant²⁰;
- 298 (12) as to the effect of a payment of compensation under the scheme in relation to rights or obligations arising out of the claim against a relevant person in respect of which the payment was made²¹, and for conferring on the scheme manager a right of recovery against that person²².

Neither the scheme manager nor any person who is, or is acting as, its board member, officer or member of staff is liable in damages for anything done or omitted in the discharge, or purported discharge, of the body's functions²³. However, this immunity does not apply if the act or omission is shown to have been in bad faith²⁴, or so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998²⁵.

¹ As to the Financial Services Authority see PARA 821 ante.

² The rules are known as the Financial Services Compensation Scheme: Financial Services and Markets Act 2000 s 213(2); the rules are available on the scheme's website.

3 A 'relevant person' means a person who was an authorised person at the time the act or omission giving rise to the claim against him took place, or an appointed representative of an authorised person at that time: see *ibid* s 213(9). However, a person who at that time qualified for authorisation under Sch 3 of the Act, and fell within a prescribed category, is not to be regarded as a relevant person in relation to any activities for which he had permission as a result of any provision of, or made under, that Schedule unless he had elected to participate in the scheme in relation to those activities at that time: s 213(10). For the meaning of 'authorised person' see *PARA 22* note 3 *ante*.

4 *Ibid* s 213(1). As to the scheme generally see *FINANCIAL SERVICES AND INSTITUTIONS* vol 48 (2008) *PARA 583* et seq.

5 The scheme manager is a body corporate established by the Financial Services Authority to exercise the functions conferred on the scheme manager by or under *ibid* Pt XV, (ss 212-224): see s 212(1).

6 For the meaning of 'regulated activity' see *PARA 22* note 3 *ante*.

7 As to the statutory restrictions on the carrying on of insurance business see *PARA 22* *ante*; as to the powers of the Financial Services Authority to grant permission for the carrying on of such business see *PARAS 31-35* *ante*.

8 Financial Services and Markets Act 2000 s 213(3)(a).

9 *Ibid* s 213(3)(b). In making any provision of the scheme by virtue of this provision the Authority must take account of the desirability of ensuring that the amount of the levies imposed on a particular class of authorised person reflects, so far as practicable, the amount of the claims made, or likely to be made, in respect of that class of person: s 213(5). The compensation scheme may provide for the scheme manager to have power to impose levies on authorised persons, or any class of authorised person, for the purpose of recovering the cost, whenever incurred, of establishing the scheme: s 213(4).

10 *Ibid* s 214(1)(a).

11 *Ibid* s 214(1)(b).

12 *Ibid* s 214(1)(c).

13 *Ibid* s 214(1)(d).

14 *Ibid* s 214(1)(e).

15 *Ibid* s 214(1)(f).

16 *Ibid* s 214(1)(g).

17 *Ibid* s 214(1)(h).

18 *Ibid* s 214(1)(i).

19 *Ibid* s 214(1)(j).

20 *Ibid* s 214(1)(k).

21 *Ibid* s 215(1)(a).

22 *Ibid* s 215(1)(b). A right of recovery conferred by the scheme does not, in the event of the relevant person's insolvency, exceed such right (if any) as the claimant would have had in that event: s 215(2). As to the rights of the scheme in the relevant person's bankruptcy see *FINANCIAL SERVICES AND INSTITUTIONS* vol 48 (2008) *PARA 586*.

23 *Ibid* s 222(1).

24 *Ibid* s 222(2)(a).

25 *Ie* under the Human Rights Act 1998 s 6(1): Financial Services and Markets Act 2000 s 222(2)(b). As to the Human Rights Act 1998 s 6 see *JUDICIAL REVIEW* vol 61 (2010) *PARA 651*.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(2) THE FINANCIAL SERVICES COMPENSATION SCHEME/823. Insurers in financial difficulties.

823. Insurers in financial difficulties.

The Financial Services Compensation Scheme¹ may, in particular, include provision for the scheme manager² to have power to take measures for safeguarding policyholders, or policyholders of a specified class, of relevant insurers³. Relevant insurers are relevant persons⁴ who have permission to effect or carry out contracts of insurance⁵ and who are in financial difficulties⁶. The measures may include such measures as the scheme manager considers appropriate for

- 299 (1) securing or facilitating the transfer of a relevant insurer's business so far as it consists of the carrying out of contracts of insurance, or of any part of that business, to another authorised person⁷;
- 300 (2) giving assistance to the relevant insurer to enable it to continue to effect or carry out contracts of insurance⁸.

The scheme may require the scheme manager to be satisfied that any measures he proposes to take are likely to cost less than it would cost to pay compensation under the scheme if the relevant insurer became unable, or likely to be unable, to satisfy claims made against it⁹. The scheme manager may be given power under the scheme to make interim payments in respect of eligible policyholders of a relevant insurer and to indemnify any person making payments to eligible policyholders¹⁰. The Financial Services Authority¹¹ may be authorised under the scheme (a) to give assistance to the scheme manager to determine what measures are practicable or desirable in the case of a particular relevant insurer¹²; (b) to impose constraints on the taking of measures by the scheme manager in the case of a particular relevant insurer¹³; (c) to require the scheme manager to provide it with information about any particular measures which the scheme manager is proposing to take¹⁴.

1 As to the Financial Services Compensation Scheme see PARA 822 ante.

2 As to the scheme manager see PARA 822 note 5 ante.

3 Financial Services and Markets Act 2000 s 217(1). A provision of the scheme enabling the imposition of levies on authorised persons (see PARA 822 text and note 9 ante) may include power to impose levies for the purpose of meeting expenses of the scheme manager incurred in taking such measures: see s 217(7)(a).

4 For the meaning of 'relevant person' see PARA 822 note 3 ante.

5 As to the powers of the Financial Services Authority to grant permission to effect or carry out contracts of insurance see PARAS 31-35 ante.

6 Financial Services and Markets Act 2000 s 217(2). 'Financial difficulties' has such meaning as may be specified in the scheme: ss 213(8), 217(8).

7 Ibid s 217(3)(a). The scheme may provide that if such measures are to be taken they should be on terms appearing to the scheme manager to be appropriate including terms reducing or deferring payment of any of the things to which any eligible policyholders of the relevant insurer are entitled: see s 217(4)(a). 'Eligible policyholders' has such meaning as may be specified in the scheme: ss 213(8), 217(8). As to the meaning of 'authorised person' see PARA 22 note 3 ante.

8 Ibid s 217(3)(b). The scheme may provide that if such measures are to be taken they should be conditional on the reduction of or the deferment of the payment of the things to which any eligible policyholders of the relevant insurer are entitled: see s 217(4)(b). The scheme may also provide for ensuring that such measures do

not benefit to any material extent persons who were members of a relevant insurer when it began to be in financial difficulties or who had any responsibility for, or who may have profited from, the circumstances giving rise to its financial difficulties, except in specified circumstances: see s 217(4)(c).

9 See *ibid* s 217(4)(d).

10 See *ibid* s 217(6)(a), (b). A provision of the scheme enabling the imposition of levies on authorised persons (see *PARA* 822 text and note 9 *ante*) may include power to impose levies for the purpose of meeting expenses of the scheme manager incurred in making such payments or giving such indemnities: see s 217(7)(b).

11 As to the Financial Services Authority see *PARA* 821 *ante*.

12 See the Financial Services and Markets Act 2000 s 217(5)(a).

13 *Ibid* s 217(5)(b).

14 *Ibid* s 217(5)(c).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(2) THE FINANCIAL SERVICES COMPENSATION SCHEME/824.
Continuity of long term insurance policies.

824. Continuity of long term insurance policies.

The Financial Services Compensation Scheme¹ may, in particular, include provision requiring the scheme manager² to make arrangements for securing continuity of insurance for policyholders, or policyholders of a specified class, of relevant long term insurers³. The scheme may authorise the scheme manager to make payments to the policyholders concerned during any period while he is seeking to make those arrangements if it appears to him that it is not reasonably practicable to make such arrangements⁴. The scheme may also provide for the scheme manager to take such measures as appear to him to be appropriate:

- 301 (1) for securing or facilitating the transfer of a relevant long term insurer's business so far as it consists of the carrying out of contracts of long term insurance, or of any part of that business, to another authorised person⁵;
- 302 (2) for securing the issue by another authorised person to the policyholders concerned of policies in substitution for their existing policies⁶.

1 As to the Financial Services Compensation Scheme see PARA 822 ante.

2 As to the scheme manager see PARA 822 note 5 ante.

3 Financial Services and Markets Act 2000 s 216(1). 'Relevant long term insurers' means relevant persons who have permission to effect or carry out contracts of long term insurance and are unable, or likely to be unable, to satisfy claims made against them: s 216(2). For the meaning of 'relevant person' see PARA 822 note 3 ante; as to the powers of the Financial Services Authority to grant permission to effect or carry out contracts of insurance see PARAS 31-35 ante.

4 See *ibid* s 216(4).

5 *Ibid* s 216(3)(a). For the meaning of 'authorised person' see PARA 22 note 3 ante.

6 *Ibid* s 216(3)(b). A provision of the scheme made by virtue of s 213(3)(b) (as to which see PARA 822 text and note 9 ante) may include power to impose levies for the purpose of meeting expenses of the scheme manager incurred in taking measures as a result of any provision of the scheme made by virtue of s 216(3), and making payments as a result of any provision made by virtue of s 216(4): s 216(5).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(2) THE FINANCIAL SERVICES COMPENSATION SCHEME/825. The scheme manager's powers to obtain information.

825. The scheme manager's powers to obtain information.

The scheme manager¹ may require the relevant person² in respect of whom a claim is made under the Financial Services Compensation Scheme³ or a person otherwise involved⁴, by notice in writing, to provide specified information or information of a specified description, or to produce specified documents or documents of a specified description⁵. The scheme manager may take copies or extracts from any document produced or may require the person producing it to provide an explanation of the document⁶. Where a claim is made in respect of an insolvent relevant person an administrative receiver, administrator, liquidator or trustee in bankruptcy of the insolvent person must permit a person authorised by the scheme manager to inspect relevant documents⁷. The Official Receiver must permit any person authorised by the scheme manager to inspect any documents which have come into his possession for the purpose of establishing the identity of persons to whom the scheme manager may be liable to make a payment in accordance with the compensation scheme, or the amount of any such payment⁸. If a person fails to comply with a requirement to provide information or produce documents⁹ the scheme manager may certify that fact in writing to the High Court and the court may enquire into the case¹⁰. If the court is satisfied that the person failed without reasonable excuse to comply with the requirement it may deal with him as if he were in contempt¹¹.

1 As to the scheme manager see PARA 822 note 5 ante.

2 'Relevant person' means a person who was an authorised person, or an appointed representative, at the time the act or omission which may give rise to the liability of the scheme manager to make a payment under the scheme: Financial Services and Markets Act 2000 ss 219(8), 224(3); for the meaning of 'authorised person' see PARA 22 note 3 ante.

3 As to the Financial Services Compensation Scheme see PARA 822 ante.

4 A person is involved in a claim made under the scheme if he was knowingly involved in the act or omission giving rise to the claim: Financial Services and Markets Act 2000 s 219(10).

5 See *ibid* s 219(1), (3). The information or documents must be provided or produced within such period and in the case of information in such manner or form, as may be specified in the notice: s 219(2). If a person fails to produce a document the scheme manager may require him to state, to the best of his knowledge and belief, where the document is: s 219(5).

6 See *ibid* s 219(4).

7 See *ibid* s 220(1)-(3). This provision does not apply to the Official Receiver: s 220(4)(a). As to insolvency generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY and COMPANY AND PARTNERSHIP INSOLVENCY.

8 See *ibid* s 224(1), (5). As to the Official Receiver see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 31 et seq; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 503 et seq.

9 I.e a requirement under either *ibid* s 219 (see the text and notes 1-6 supra) or s 220 (see the text and note 7 supra): s 221(1)(a), (b).

10 See *ibid* s 221(1), (3).

11 *Ibid* s 221(2). As to contempt of court generally see CONTEMPT OF COURT. In the case of a body corporate the court may deal with any director or officer of it; in relation to a limited liability partnership 'officer' means a member of the limited liability partnership: s 221(2) (amended by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9, Sch 5 para 21).

UPDATE

825 The scheme manager's powers to obtain information

NOTE 7--Financial Services and Markets Act 2000 s 220(3) amended: SI 2009/805.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(3) THE FINANCIAL OMBUDSMAN SERVICE/826. The Financial Ombudsman Service.

(3) THE FINANCIAL OMBUDSMAN SERVICE

826. The Financial Ombudsman Service.

The Financial Ombudsman Service is a scheme¹ set up under the Financial Services and Markets Act 2000 under which certain disputes may be resolved quickly and with minimum formality by an independent person². For the purpose of funding the establishment of the scheme and its operation in relation to the compulsory jurisdiction³, the Financial Services Authority⁴ may make rules requiring authorised persons or any class of authorised person⁵ to make payment to it or to the scheme operator, and specifying the amounts to be paid or the way in which they are to be calculated⁶.

1 The scheme is to be operated by a body corporate established by the Financial Services Authority: Financial Services and Markets Act 2000 s 225(2), Sch 17 para 2(1). The scheme is to be operated under a name chosen by the scheme operator: s 225(3). The Financial Ombudsman Service is the name chosen by the scheme operator; the Service maintains its own website. As to the scheme and the scheme operator generally see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575 et seq.

2 See *ibid* s 225(1).

3 As to the compulsory jurisdiction see PARA 827 post.

4 As to the Financial Services Authority see PARA 821 ante.

5 For the meaning of 'authorised person' see PARA 22 note 3 ante.

6 See the Financial Services and Markets Act 2000 s 234(1), (2).

UPDATE

826 The Financial Ombudsman Service

TEXT AND NOTES 3-6--For this purpose, the Financial Services Authority may also make rules imposing such requirements on any payment service provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 1399): Financial Services and Markets Act 2000 s 234(1), (2) (s 234(1) amended by SI 2009/209).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(3) THE FINANCIAL OMBUDSMAN SERVICE/827. Compulsory jurisdiction of the Financial Ombudsman Service.

827. Compulsory jurisdiction of the Financial Ombudsman Service.

A complaint which relates to an act or omission of a person ('the respondent') in carrying on an activity¹ to which the compulsory jurisdiction rules² apply is to be dealt with under the ombudsman scheme³ if certain conditions are satisfied⁴. The conditions are that:

- 303 (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme⁵;
- 304 (2) the respondent was an authorised person⁶ at the time of the act or omission to which the complaint relates⁷; and
- 305 (3) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question⁸.

A complainant is eligible if he falls within a class of person specified in the compulsory jurisdiction rules as eligible⁹. The rules may include provision for persons other than individuals to be eligible, but may not provide for authorised persons to be eligible except in specified circumstances or in relation to complaints of a specified kind¹⁰. The ombudsman is to determine a complaint under the compulsory jurisdiction¹¹ by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case¹². The ombudsman must give a written statement of his determination to the respondent and to the complainant¹³. The statement must give the ombudsman's reasons for his determination¹⁴, be signed by him¹⁵ and require the complainant to notify him in writing, before a date specified in the statement, whether he accepts or rejects the determination¹⁶. If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final¹⁷. If, by the specified date, the complainant has not notified the ombudsman of his acceptance or rejection of the determination he is to be treated as having rejected it¹⁸ and the ombudsman must notify the respondent of the outcome¹⁹.

1 Only activities which are regulated activities, or which could be made regulated activities by an order under the Financial Services and Markets Act 2000 s 22, may be specified in the compulsory jurisdiction rules: Financial Services and Markets Act 2000 s 226(4). Activities may be specified by reference to specified categories (however described): s 226(5). As to regulated activities see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 80 et seq.

2 'Compulsory jurisdiction rules' means rules made by the Financial Services Authority for the purposes of *ibid* s 226 and specifying the activities to which they apply: s 226(3). As to the compulsory jurisdiction generally see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 576, 579-580.

3 As to the ombudsman scheme see PARA 826 ante.

4 Financial Services and Markets Act 2000 s 226(1).

5 *Ibid* s 226(2)(a).

6 For the meaning of 'authorised person' see PARA 22 note 3 ante.

7 Financial Services and Markets Act 2000 s 226(2)(b).

8 *Ibid* s 226(2)(c).

9 *Ibid* s 226(6).

10 Ibid s 226(7)(a), (b).

11 See ibid s 228(1).

12 Ibid s 228(2).

13 Ibid s 228(3).

14 Ibid s 228(4)(a).

15 Ibid s 228(4)(b).

16 Ibid s 228(4)(c).

17 Ibid s 228(5).

18 Ibid s 228(6).

19 Ibid s 228(7). A copy of the determination on which appears a certificate signed by an ombudsman is evidence that the determination was made under the scheme: s 228(8). A certificate purporting to be signed by an ombudsman is to be taken to have been duly signed unless the contrary is shown: s 228(9).

UPDATE

827 Compulsory jurisdiction of the Financial Ombudsman Service

TEXT AND NOTE 7--Head (2). Such a complaint is also to be dealt with under the ombudsman scheme if the respondent was a payment services provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 1399) at the time of the act or omission to which the complaint relates: Financial Services and Markets Act 2000 s 226(2)(b) (amended by SI 2009/209).

NOTE 11--Financial Services and Markets Act 2000 s 228(1) amended: Consumer Credit Act 2006 s 61(3).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(3) THE FINANCIAL OMBUDSMAN SERVICE/828. Awards under the compulsory jurisdiction.

828. Awards under the compulsory jurisdiction.

If a complaint under the compulsory jurisdiction¹ is determined in favour of the complainant, the determination may include: (1) an award (known as a money award) against the respondent of such amount as the ombudsman² considers fair compensation for loss or damage suffered by the complainant³; (2) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)⁴. A money award may compensate for financial loss⁵, or any other loss or damage as specified in the compulsory jurisdiction rules⁶. A money award may not exceed the monetary limit specified in the rules⁷ but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance⁸. A money award may provide for the amount payable under the award to bear interest at a rate and as from a date specified in the award⁹. A money award is enforceable by the complainant, if a county court so orders, by execution issued from the county court (or otherwise) as if it were payable under an order of that court¹⁰. Compliance with a direction by the ombudsman¹¹ is enforceable by an injunction¹². Only the complainant may bring proceedings for an injunction¹³.

Rules (known as costs rules) made by the scheme operator, and approved by the Financial Services Authority, may provide for an ombudsman to have power, on determining a complaint under the compulsory jurisdiction, to award costs¹⁴. Costs rules may not provide for the making of an award against the complainant in respect of the respondent's costs¹⁵. However, they may provide for the making of an award against the complainant in favour of the Financial Ombudsman Service for the purpose of providing a contribution to resources deployed in dealing with the complaint, if in the opinion of the ombudsman the complainant's conduct was improper or unreasonable¹⁶, or the complainant was responsible for an unreasonable delay¹⁷. Costs rules may also authorise an ombudsman making an award of costs to order that the amount payable under the award bears interest at a rate and as from a date specified in the order¹⁸.

1 See the Financial Services and Markets Act 2000 s 229(1). As to the compulsory jurisdiction see PARA 827 ante.

2 As to the Financial Ombudsman Service see PARA 826 ante.

3 Financial Services and Markets Act 2000 s 229(2)(a).

4 Ibid s 229(2)(b).

5 Ibid s 229(3)(a).

6 Ibid s 229(3)(b), (11). For the meaning of the 'compulsory jurisdiction rules' see PARA 827 note 2 ante. The Financial Services Authority may specify the maximum amount which may be regarded as fair compensation for a particular kind of loss or damage: s 229(4). As to the Financial Services Authority see PARA 821 ante.

7 Different amounts may be specified in relation to different kinds of complaint: ibid s 229(7).

8 Ibid s 229(5), (6), (11).

9 Ibid s 229(8)(a).

10 Ibid s 229(8)(b), Sch 17 para 16. As to execution of judgments see CIVIL PROCEDURE vol 12 (2009) PARA 1265 et seq.

11 Ie a direction under ibid s 229(2)(b): see the text and note 4 supra.

12 Ibid s 229(9)(a). As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

13 Ibid s 229(10).

14 See ibid s 230(1), (2). As to the scheme operator see PARA 826 note 1 ante. Any award made against the respondent is to be treated as a money award enforceable under Sch 17 para 16: s 230(7).

15 Ibid s 230(3).

16 Ibid s 230(4)(a).

17 Ibid s 230(4)(b). An amount due under an award made in favour of the Financial Ombudsman Service is recoverable as a debt due to the scheme operator: s 230(6).

18 Ibid s 230(5).

UPDATE

828 Awards under the compulsory jurisdiction

TEXT AND NOTES--Financial Services and Markets Act 2000 ss 229, 230 amended:
Consumer Credit Act 2006 s 61(3)-(8).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(3) THE FINANCIAL OMBUDSMAN SERVICE/829. Voluntary jurisdiction of the Financial Ombudsman Service.

829. Voluntary jurisdiction of the Financial Ombudsman Service.

The scheme operator¹ may make rules, to be known as voluntary jurisdiction rules, specifying the activities to which they apply². The only activities which may be specified in the rules are activities which are, or could be, specified in compulsory jurisdiction rules³. A complaint which relates to an act or omission of a person ('the respondent') in carrying on an activity to which voluntary jurisdiction rules apply is to be dealt with under the Financial Ombudsman Service if certain conditions are satisfied⁴. The conditions are that

- 306 (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme⁵;
- 307 (2) at the time of the act or omission to which the complaint relates, the respondent was participating in the scheme⁶;
- 308 (3) at the time when the complaint is referred under the scheme, the respondent has not withdrawn from the scheme in accordance with its provisions⁷;
- 309 (4) the act or omission to which the complaint relates occurred at a time when voluntary jurisdiction rules were in force in relation to the activity in question⁸; and
- 310 (5) the complaint cannot be dealt with under the compulsory jurisdiction⁹.

A complainant is eligible in relation to the voluntary jurisdiction of the ombudsman scheme if he falls within a class of person specified in the rules as eligible¹⁰. In such circumstances as may be specified in voluntary jurisdiction rules, a complaint which relates to an act or omission occurring at a time before the rules came into force, and which could have been dealt with under a scheme which has to any extent been replaced by the voluntary jurisdiction¹¹, is to be dealt with under the ombudsman scheme even though certain of the specified conditions are not satisfied¹². In such circumstances as may be specified in voluntary jurisdiction rules, a complaint is to be dealt with under the ombudsman scheme even though certain of the specified conditions are not met¹³, and the complaint is not brought within the scheme as a result of the previous provision¹⁴, but only if the respondent has agreed that complaints of that kind were to be dealt with under the scheme¹⁵.

1 As to the scheme operator see PARA 826 note 1 ante.

2 Financial Services and Markets Act 2000 s 227(3). The jurisdiction which results from the rules is known as the 'voluntary jurisdiction': see s 227(12); and as to the voluntary jurisdiction rules generally see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 578. The rules require the approval of the Financial Services Authority: s 227(6). As to the Financial Services Authority see PARA 821 ante.

3 Ibid s 227(4). Activities may be specified by reference to specified categories (however described): s 227(5). As to compulsory jurisdiction rules see PARA 827 ante.

4 Ibid s 227(1).

5 Ibid s 227(2)(a).

6 Ibid s 227(2)(b). A person qualifies for participation in the ombudsman scheme if he falls within a class of person specified in the rules in relation to the activity in question: s 227(9). The rules may provide for persons other than authorised persons to participate in the ombudsman scheme, and may make different provision in relation to complaints arising from different activities: s 227(10), (11). For the meaning of 'authorised person' see PARA 22 note 3 ante.

7 Ibid s 227(2)(c).

8 Ibid s 227(2)(d).

9 Ibid s 227(2)(e).

10 Ibid s 227(7). The rules may include provision for persons other than individuals to be eligible: s 227(8).

11 Previous schemes for which the Financial Ombudsman Service now has responsibility include the Banking Ombudsman scheme, the Building Societies Ombudsman scheme, the Personal Investment Authority Ombudsman bureau, the Insurance Ombudsman bureau and the Security and Futures Authority complaints bureau. For information as to which schemes have been replaced by the voluntary jurisdiction see the Financial Ombudsman Service website.

12 Financial Services and Markets Act 2000 s 227(13). The conditions referred to are those listed in heads (2)-(5) in the text (see the text and notes 6-9 supra).

13 Ibid s 227(14)(a). The conditions referred to are those listed in heads (2)-(5) in the text (see the text and notes 6-9 supra).

14 Ie ibid s 227(13) (see the text and notes 11-12 supra): s 227(14)(b).

15 Ibid s 227(14).

UPDATE

829 Voluntary jurisdiction of the Financial Ombudsman Service

TEXT AND NOTE 9--Financial Services and Markets Act 2000 s 227(2)(e) amended:
Consumer Credit Act 2006 s 61(2).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/13. REGULATION OF INSURANCE COMPANIES/(3) THE FINANCIAL OMBUDSMAN SERVICE/830. Ombudsman's power to obtain information.

830. Ombudsman's power to obtain information.

Where an ombudsman considers it necessary for the determination of a complaint¹ he may give to a party to a complaint written notice requiring that party to provide specified information or information of a specified description, or to produce specified documents or documents of a specified description². The information or documents must be provided or produced before the end of such reasonable period, and in the case of information in such manner or form, as may be specified in the notice³. The ombudsman may take copies or extracts from any document produced, or may require the person producing it to provide an explanation of the document⁴. If a person who is required to produce a document fails to do so, the ombudsman may require him to state, to the best of his knowledge and belief, where the document is⁵. If a person fails to comply with a requirement to provide information or to produce documents⁶, the ombudsman may certify that fact in writing to the High Court and the court may enquire into the case⁷. If the court is satisfied that the person failed without reasonable excuse to comply with the requirement, it may deal with him as if he were in contempt⁸.

¹ See the Financial Services and Markets Act 2000 s 231(3). As to the Financial Ombudsman Service see PARA 826 ante.

² Ibid s 231(1)(a), (b). 'Specified' means specified in the notice: s 231(7). If a person claims a lien on a document, its production under this provision does not affect the lien: s 231(6). As to liens in general see LIEN.

³ Ibid s 231(2)(a), (b).

⁴ Ibid s 231(4).

⁵ Ibid s 231(5).

⁶ Ie under ibid s 231 (see the text and notes 1-5 supra): s 232(1).

⁷ Ibid s 232(1), (3).

⁸ See ibid s 232(2). As to contempt of court generally see CONTEMPT OF COURT. In the case of a body corporate the court may deal with any director or officer; in relation to a limited liability partnership 'officer' means a member of the limited liability partnership: see s 232(2) (amended by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9, Sch 5 para 21).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/831. Nature and management of the tax.

14. INSURANCE PREMIUM TAX

(1) CHARGE TO TAX; PERSONS CHARGEABLE

(i) The Tax

831. Nature and management of the tax.

Insurance premium tax¹ is charged on the receipt of a premium² by an insurer³ under a taxable insurance contract⁴ on or after 1 October 1994⁵. Tax is charged by reference to the chargeable amount⁶. Tax is charged at the higher rate of 17.5 per cent in the case of a premium which is liable to tax at that rate⁷ and at the standard rate of 5 per cent in any other case⁸. The tax is payable by the person who is the insurer in relation to the contract under which the premium is received⁹.

Notwithstanding any obligation not to disclose information that would otherwise apply, the Commissioners¹⁰ may disclose information to the Secretary of State or to an authorised officer of his¹¹, or to the Treasury or an authorised officer of theirs¹², for the purpose of assisting them in the performance of their duties¹³. Similarly the Secretary of State, or the Treasury may disclose information to the Commissioners or to an authorised officer of the Commissioners for the purpose of assisting the Commissioners in the performance of duties in relation to the tax¹⁴.

1 The tax is charged in accordance with the Finance Act 1994 Pt III (ss 48-74) (as amended) and is under the care and management of the Commissioners of Customs and Excise: s 48.

2 For the meaning of 'premium' see PARA 833 post.

3 'Insurer' means a person or body of persons (whether incorporated or not) carrying on insurance business: Finance Act 1994 s 73(1). 'Insurance business' means a business which consists of or includes the provision of insurance: s 73(1) (definition added by the Finance Act 1995 s 34, Sch 5 para 6).

4 Finance Act 1994 s 49(a). 'Taxable insurance contract' means any contract of insurance: s 70(1) (amended by the Insurance Premium Tax (Taxable Insurance Contracts) Order 1994, SI 1994/1698, art 4(a)). The Treasury may make provision by order, in such way as it thinks fit, that a contract of insurance that would otherwise not be a taxable insurance contract is a taxable insurance contract, or that a contract of insurance that would otherwise be a taxable insurance contract is not a taxable insurance: see the Finance Act 1994 s 71(1), (3); and the Insurance Premium Tax (Taxable Insurance Contracts) Order 1994, SI 1994/1698; the Insurance Premium Tax (Taxable Insurance Contracts) Order 1996, SI 1996/2955; the Insurance Premium Tax (Taxable Insurance Contracts) Order 1997, SI 1997/1627. A contract of insurance may be described by reference to the nature of the insured or by reference to such other factors as the Treasury thinks fit: see the Finance Act 1994 s 71(2). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517. As to contracts of insurance which are not taxable insurance contracts see PARA 832 post.

5 Ibid s 49(b).

6 Ibid s 50(1). The 'chargeable amount' is such amount as, with the addition of the tax chargeable, is equal to the amount of the premium: s 50(2).

7 Ibid s 51(1)(a), (2)(a) (both substituted by the Finance Act 1997 ss 21(1), 24(1)): as to premiums chargeable at the higher rate see PARA 834 post.

8 Finance Act 1994 s 51(1)(b), (2)(b) (both as substituted: see note 7 supra; s 51(2)(b) further amended by the Finance Act 1999 s 125(1)). All money and securities for money collected or received for or on account of the tax if collected or received in Great Britain must be placed to the general account of the Commissioners of

Customs and Excise kept at the Bank of England under the Customs and Excise Management Act 1979 s 17: Finance Act 1994 s 64, Sch 7 para 32. For the meaning of 'Great Britain' see PARA 8 note 3 ante.

9 Ibid s 52(1). This provision has effect subject to any regulations made under s 65 (see PARA 847 post): s 52(2). Tax due from any person is recoverable as a debt due to the Crown: Sch 7 para 7(1). As to the provisions for the determination of the chargeable amount of tax where a contract provides cover for any combination of matters subject to tax at the standard rate, the higher rate or not subject to tax, see s 69 (substituted by the Finance Act 1997 ss 23(1), 24(1)). An order under the Finance Act 1994 s 71 (see note 4 supra) may amend or modify the effect of s 69 in such way as the Treasury think fit: s 71(4).

10 'The Commissioners' means the Commissioners of Customs and Excise: ibid s 73(1): see generally CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq.

11 Ibid Sch 7 para 28(1). 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1; as to the office of Secretary of State see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355.

12 Finance Act 1994 Sch 7 para 28A(1) (para 28A added by the Transfer of Functions (Insurance) Order 1997, SI 1997/2781, art 8, Schedule para 124).

13 Finance Act 1994 Sch 7 paras 28(1), 28A(1) (as added: see note 12 supra).

14 See ibid Sch 7 paras 28(2), 28A(2) (as added: see note 12 supra).

UPDATE

831 Nature and management of the tax

NOTE 1--Insurance premium tax is compatible with EC Council Directive 77/388 art 33 (prohibition of turnover taxes on insurance contracts), and does not constitute a state aid within the meaning of the EC Treaty art 87: Case C-308/01 *GIL Insurance Ltd v Customs and Excise Comrs* [2004] All ER (EC) 954, ECJ.

NOTE 8--1994 Act Sch 7 para 32 repealed: Commissioners for Revenue and Customs Act 2005 Sch 4 para 53, Sch 5.

TEXT AND NOTES 10-13--The Commissioners may also disclose information to the Financial Services Authority for the purpose of assisting it in the performance of its functions: see the Finance Act 1994 Sch 7 para 28B (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2004, SI 2004/355).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/832. Contracts not taxable insurance contracts.

832. Contracts not taxable insurance contracts.

A contract is not a taxable insurance contract if it is a contract within one or more of the following categories¹:

- 311 (1) reinsurance²;
- 312 (2) exclusively of long term insurance³;
- 313 (3) relating to a motor vehicle for use by a handicapped person⁴;
- 314 (4) relating to a commercial ship⁵;
- 315 (5) relating to a lifeboat⁶, or to a lifeboat and lifeboat equipment⁷;
- 316 (6) relating to a commercial aircraft⁸;
- 317 (7) relating to risks outside the United Kingdom⁹;
- 318 (8) relating to foreign or international railway rolling stock¹⁰;
- 319 (9) relating to the Channel tunnel system¹¹, or to Channel tunnel equipment¹²;
- 320 (10) relating to the loss or damage of goods in foreign or international transit¹³;
- 321 (11) relating to credit¹⁴, or to exchange losses¹⁵;
- 322 (12) relating to the provision of financial facilities¹⁶.

1 Finance Act 1994 s 70(1A), (1B) (both added by the Insurance Premium Tax (Taxable Insurance Contracts) Order 1994, SI 1994/1698, art 4(b)). For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

2 See the Finance Act 1994 s 70(1A), (1B) (both as added: see note 1 supra), Sch 7A para 1 (Sch 7A added by the Insurance Premium Tax (Taxable Insurance Contracts) Order 1994, SI 1994/1698, art 5).

3 See the Finance Act 1994 Sch 7A para 2 (as added (see note 2 supra); and amended by the Insurance Premium Tax (Taxable Insurance Contracts) Order 1997, SI 1997/1627, art 2(a), (b); and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1)-(3)).

4 See the Finance Act 1994 Sch 7A para 3 (as added (see note 2 supra); and amended by the Secretaries of State for Education and Skills and for Work and Pensions Order 2002, SI 2002/1397, art 12, Schedule Pt 1 para 10).

5 See the Finance Act 1994 Sch 7A para 4 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (4)(a), (b)).

6 See the Finance Act 1994 Sch 7A para 5 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (5)(a), (b)).

7 See the Finance Act 1994 Sch 7A para 6 (as added: see note 2 supra).

8 See *ibid* Sch 7A para 7 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (6)(a), (b)).

9 See the Finance Act 1994 Sch 7A para 8 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (7)).

10 See the Finance Act 1994 Sch 7A para 9 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (8)(a), (b)).

11 See the Finance Act 1994 Sch 7A para 10 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (9)(a), (b)).

12 See the Finance Act 1994 Sch 7A para 11 (as added (see note 2 supra); and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (10)(a), (b)).

13 See the Finance Act 1994 Sch 7A para 12 (as added: see note 2 supra).

14 See *ibid* Sch 7A para 13 (as added: see note 2 supra).

15 See *ibid* Sch 7A para 14 (as added: see note 2 supra).

16 See *ibid* Sch 7A para 15 (as added (see note 2 supra); and amended by the Insurance Premium Tax (Taxable Insurance Contracts) Order 1996, SI 1996/2955, art 2; and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 346(1), (11)).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/833. Premium.

833. Premium.

In relation to a taxable insurance contract¹ a premium is any payment received under the contract by the insurer², and in particular includes any payment wholly or partly referable to:

- 323 (1) any risk³;
- 324 (2) costs of administration⁴;
- 325 (3) commission⁵;
- 326 (4) any facility for paying in instalments or making deferred payment, whether or not payment for the facility is called interest⁶; or
- 327 (5) tax⁷.

A premium may consist wholly or partly of anything other than money⁸. Where a premium is to any extent received in a form other than money its amount is taken to be an amount equal to its value⁹, or if money is also received the aggregate of that amount and the money received¹⁰. Where anything is received by any person on behalf of the insurer it is treated as received by the insurer when it is received by the other person¹¹ and the later receipt of the whole or any part of it by the insurer is disregarded¹². However, this is not the case where any person is authorised, by or on behalf of an employee, to deduct from anything due to the employee under his contract of employment an amount in respect of a payment due under a taxable insurance contract¹³. Where anything is received by way of premium under a taxable insurance contract and the amount of the premium is less than it would be if it were received under the contract in open market conditions¹⁴ the Commissioners¹⁵ may direct that the amount of the premium is to be taken to be such amount as it would be if it were received under the contract in open market conditions¹⁶. A direction must be given by notice in writing to the insurer, and no direction may be given more than three years after the time of the receipt¹⁷. Specific provisions as to the taxation of premiums apply in any case where a proposed increase is announced by a Minister of the Crown in the rate at which tax is to be charged on a premium if it is received by the insurer on or after a date specified in the announcement¹⁸.

1 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

2 For the meaning of 'insurer' see PARA 831 note 3 ante.

3 Finance Act 1994 s 72(1)(a).

4 Ibid s 72(1)(b).

5 Ibid s 72(1)(c).

6 Ibid s 72(1)(d). Where (apart from s 72(6)) anything received under a contract by the insurer would be taken to be an instalment of a premium, it must be taken to be a separate premium: s 72(6).

7 Ibid s 72(1)(e). Where an amount is charged to the insured by any person in connection with a taxable insurance contract, any payment in respect of that amount is to be regarded as a payment received under that contract by the insurer unless (1) the payment is chargeable to tax at the higher rate by virtue of s 52A (as added) (see PARA 834 post); or (2) the amount is charged under a separate contract and is identified in writing to the insured as a separate amount so charged: s 72(1A) (added by the Finance Act 1997 s 28(1)).

8 Finance Act 1994 s 72(2).

9 Ibid s 72(3)(a). The value to be taken is open market value at the time of the receipt by the insurer: s 72(4). The open market value of anything at any time is an amount equal to such consideration in money as would be payable on a sale of it at that time to a person standing in no such relationship with any person as would affect that consideration: s 72(5).

10 Ibid s 72(3)(b).

11 Ibid s 72(7)(a).

12 Ibid s 72(7)(b). Where a payment is made by or on behalf of the insured to an intermediary, and the whole or part of the payment is referable to commission to which the intermediary is entitled, in determining whether or how much of the payment is received by the intermediary on behalf of the insurer, any of the payment representing commission is regarded as received by the intermediary on behalf of the insurer notwithstanding the intermediary's entitlement: s 72(8); *London General Insurance Co Ltd v Customs and Excise Comrs* [1998] V & DR 177 (arrangement fee paid to motor dealer constituted part of premium). Payment includes a payment in a form other than money: Finance Act 1994 s 72(9)).

13 Ibid s 72(7A) (s 72(7A), (8A) added by the Finance Act 1997 s 30). Where the whole or part of the amount is commission to which the person is entitled (1) if the whole of the amount is commission it is treated as received by the insurer when it is deducted by that person; and (2) otherwise, the part of the amount representing commission is treated as received by the insurer when the remainder of the payment concerned is or is treated as received by him: see the Finance Act 1994 s 72(8A) (as so added).

14 Ibid s 66(1)(a), (b). A premium is received in open market conditions if it is received by an insurer standing in no such relationship with the insured person as would affect the premium, and in circumstances where there is no other contract or arrangement affecting the parties: s 66(5)(a), (b). It is immaterial whether what is received by way of premium is money or something other than money or both: s 66(6).

15 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

16 Finance Act 1994 s 66(2).

17 Ibid s 66(3). The Commissioners may also direct that if anything is received by way of premium under the contract after the giving of the notice, or after such later date as may be specified in the notice, and the amount of the premium is less than it would be if it were received under the contract in open market conditions, the amount of the premium is to be taken to be such amount as it would be if it were received under the contract in open market conditions: s 66(4). Any notice, notification or requirement to be served on, given to or made of any person may be served, given or made by sending it by post in a letter addressed to that person or his tax representative at the last or usual residence or place of business of that person or representative: s 64, Sch 7 para 30. As to tax representatives see PARAS 845-846 post.

18 See *ibid* ss 67A, 67B, 67C (all as added).

UPDATE

833 Premium

NOTE 7--Where an amount is charged (to the insured or any other person) in respect of the acquisition of a right (whether of the insured or any other person) to require the insurer to provide, or offer to provide, any of the cover included in a taxable insurance contract, and any payment in respect of that amount is not regarded as a payment received under that contract by virtue of the Finance Act 1994 s 72(1A), the payment is to be so regarded unless it is chargeable to tax at the higher rate by virtue of s 52A: s 72(1B) (added by the Finance Act 2007 s 101).

See *Homeserve Membership Ltd v Revenue and Customs Comrs* [2009] EWHC 1311 (Ch), [2009] STC 2366 ('separate contract' meant no more than a contract which was distinct from, in the sense that it was not the same as, the contract of insurance).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/834. Premiums liable to tax at the higher rate.

834. Premiums liable to tax at the higher rate.

A premium¹ received under a taxable insurance contract² by an insurer³ is liable to tax at the higher rate if it falls within one or more of the following categories⁴:

- 328 (1) it is a premium under a taxable insurance contract relating to a motor car or motor cycle⁵ where the contract is arranged through a person, or the insurer under the contract is a person, who:
 - 19
 - 21. (a) is a supplier⁶ of motor cars or motor cycles;
 - 22. (b) is connected with⁷ a supplier of motor cars or motor cycles; or
 - 23. (c) pays the whole or any part of the premium received under the taxable insurance contract, or a fee connected with the arranging of that contract, to a supplier of motor cars or motor cycles or to a person who is connected with a supplier of motor cars or motor cycles,
 - 20
 - 329 unless the insurance is provided to the insured free of charge⁸;
 - 330 (2) it is a premium under a taxable insurance contract relating to relevant goods⁹ where the contract is arranged through a person, or the insurer under the contract is a person who:
 - 21
 - 24. (a) is a supplier¹⁰ of relevant goods;
 - 25. (b) is connected with¹¹ a supplier of relevant goods; or
 - 26. (c) pays the whole or any part of the premium received under the taxable insurance contract, or a fee connected with the arranging of that contract, to a supplier of relevant goods or to a person who is connected with a supplier of relevant goods,
 - 22
 - 331 unless the insurance is provided to the insured free of charge¹²;
 - 332 (3) it is a premium under a taxable insurance contract in respect of the provision of cover against travel risks¹³ for a person travelling¹⁴.

Where at or about the time when a higher rate contract¹⁵ is effected, and in connection with that contract, a fee in respect of an insurance related service¹⁶ is charged by a taxable intermediary¹⁷ to a person who is or becomes the insured (or one of the insured) under the contract or to a person who acts for or on behalf of such a person, a payment in respect of the fee must be treated as a premium received under a taxable insurance contract by an insurer and is chargeable to tax at the higher rate¹⁸. The tax charged is payable by the taxable intermediary as if he were the insurer under the contract¹⁹.

1 For the meaning of 'premium' see PARA 833 ante.

2 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

3 For the meaning of 'insurer' see PARA 831 note 3 ante.

4 Finance Act 1994 s 51A(1) (s 51A added by the Finance Act 1997 ss 21(1), 24(1)). This provision is subject to the provisions relating to the charge to tax where different rates apply under the Finance Act 1994 s 69 (as substituted) (see PARA 831 note 9 ante): see s 51A(4) (as so added).

5 'Motor car ' and 'motor cycle' have the meanings given by the Road Traffic Act 1988 s 185(1): Finance Act 1994 s 51A, Sch 6A para 2(6) (s 51A as added (see note 4 supra); Sch 6A added by the Finance Act 1997 ss 22(3), 24(1), Sch 4).

6 'Supplier' does not include an insurer who supplies a car or motor cycle as a means of discharging liabilities arising by reason of a claim under an insurance contract: Finance Act 1994 Sch 6A para 2(6) (as added: see note 5 supra).

7 Any question whether a person is connected with another is to be determined in accordance with the Income and Corporation Taxes Act 1988 s 839: Finance Act 1994 Sch 6A para 1(2) (as added: see note 5 supra).

8 Ibid Sch 6A para 2(1), (2) (as added: see note 5 supra). Additional provisions in respect of the calculation of tax are set out in Sch 6A para 2(3)-(5) (as so added).

9 'Relevant goods' means any electrical or mechanical appliance of a kind which is ordinarily used in or about the home, or which is ordinarily owned by private individuals and used by them for the purposes of leisure, amusement or entertainment: ibid Sch 6A para 3(6)(a), (b) (as added: see note 5 supra); 'appliance' includes any device, equipment or apparatus and 'the home' includes any private garden and any private garage or private workshop appurtenant to a dwelling: Sch 6A para 3(7) (as so added).

10 'Supplier' does not include an insurer who supplies relevant goods as a means of discharging liabilities arising by reason of a claim under an insurance contract: ibid Sch 6A para 3(6) (as added: see PARA 5 supra).

11 As to the determination of the question of whether a person is connected with another see note 7 supra.

12 Finance Act 1994 Sch 6A para 3(1), (2) (as added: see note 5 supra). Additional provisions in respect of the calculation of tax are set out in Sch 6A para 3(3)-(5) (as so added).

13 'Travel risks' means risks associated with, or related to, travel or intended travel

42 (1) outside the United Kingdom;

43 (2) by air within the United Kingdom;

44 (3) within the United Kingdom in connection with travel falling within (1) or (2) supra; or

45 (4) which involves absence from home for at least one night,

or risks to which a person travelling may be exposed during, or at any place at which he may be in the course of, any such travel: ibid Sch 6A para 4(5) (as added (see note 5 supra); substituted by the Finance Act 1998 ss 146(1), (2)).

14 Finance Act 1994 Sch 6A para 4(1) (as substituted: see note 13 supra). 'Person travelling' includes a person intending to travel: see Sch 6A para 4(5) (as so substituted). A premium is not subject to tax if it is payable under a contract of insurance providing cover against both travel risks and other risks, where the premium attributable to the cover against travel risks does not exceed 10% of the total premium, and the contract does not provide cover against specified travel risks: see Sch 6A para 4(2), (3) (as so substituted). A premium is not subject to tax if it is payable under a taxable insurance contract relating to a motor vehicle and is attributable to cover of the kind generally known as (1) fully comprehensive; (2) third party, fire and theft; (3) third party; or (4) roadside assistance, or if it is payable under a taxable insurance contract relating to a caravan, boat or aircraft and is attributable to cover of a specified description for a period of at least one month for the person travelling: see Sch 6A para 4(4) (as so substituted).

15 A contract of insurance is a 'higher rate contract' if it is a taxable insurance contract and the whole or any part of a premium received under the contract by the insurer is (apart from the provisions of ibid s 52A (as added)) liable to tax at the higher rate: s 52A(4) (s 52A added by the Finance Act 1997 s 25).

16 'Insurance related service' means any service which is related to, or connected with, insurance: Finance Act 1994 s 52A(9) (as added: see note 15 supra).

17 A 'taxable intermediary' is a person who at or about the time when a higher rate contract is effected, and in connection with that contract, charges a fee in respect of an insurance related service to a person who is or becomes the insured (or one of the insured) under the contract or to a person who acts for or on behalf of such a person, and who is:

- 46 (1) if the contract relates to motor cars or motor cycles (as to which see the text and notes 5-8 supra) or relevant goods (as to which see the text and notes 9-12 supra):
7. (a) a supplier of motor cars or motor cycles or, as the case may be, of relevant goods; or
7
8. (b) a person connected with such a person; or
8
9. (c) a person who in the course of his business pays the whole or any part of the premium received under that contract, or a fee connected with the arranging of that contract, to a person falling within head 1(a) or head 1(b) supra: *ibid* s 52A(5) (as added (see note 15 supra); and amended by the Finance Act 1998 s 147(2), (5)), Finance Act 1994 s 52A(6) (added by the Finance Act 1998 s 147(3), (5)).
9
- 47 (2) if the contract relates to travel insurance (as to which see the text and notes 13-14 supra):
10. (a) the insurer under that contract or a person connected with the insurer; or
10
11. (b) a person through whom that contract is arranged in the course of his business or a person connected with that person; or
11
12. (c) a person who in the course of his business pays the whole or any part of the premium received under that contract, or a fee connected with the arranging of that contract, to a person falling within head 2(a) or head 2(b) supra: Finance Act 1994 s 52A(5) (as so added and amended), (6A) (added by the Finance Act 1998 s 147(3), (5)).
12

Any question whether a person is connected with another must be determined in accordance with the Income and Corporation Taxes Act 1988 s 839: Finance Act 1994 s 52A(8) (as added: see note 15 supra).

18 *Ibid* s 52A(1), (2)(a), (b)(ii) (as added: see note 15 supra). The premium is treated as received at the time when the payment is made: s 52A(2)(b)(i) (as so added).

19 *Ibid* s 52A(3) (as added: see note 15 supra).

UPDATE

834 Premiums liable to tax at the higher rate

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTES 1-8--Excluded from head (1) is a premium payable under a taxable insurance contract relating to a motor car or motor cycle which is supplied by way of sale and attributable to cover of the kind generally known as fully comprehensive, third-party, fire and theft, or third-party: Finance Act 1994 Sch 6A para 2(2A) (added by SI 2009/219). 'Sale', in relation to a motor car or motor cycle, means a sale under which title to the motor car or motor cycle passes to the purchaser immediately on purchase, or a sale pursuant to a hire purchase agreement (within the meaning of the Consumer Credit Act 1974, under which it is intended at the outset of the agreement that the title to the motor car or motor cycle is to pass to the purchaser, whether on conclusion of the agreement or at the end of the period specified in the agreement: Finance Act 1994 Sch 6A para 2(6) (amended by SI 2009/219).

NOTE 8--See also Finance Act 1994 Sch 6A para 3A (added by Finance Act 2003 s 194).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/835. Adjustment of contracts.

835. Adjustment of contracts.

Where, after the making of a contract of insurance and before a given premium¹ is received by the insurer² under the contract, there is a change in the tax chargeable on the receipt of the premium³, then, unless the contract otherwise provided, there must be added to or deducted from the amount payable as the premium an amount equal to the difference between the tax chargeable had the change not been made and the tax in fact chargeable⁴.

1 For the meaning of 'premium' see PARA 833 ante.

2 For the meaning of 'insurer' see PARA 831 note 3 ante.

3 A change in the tax chargeable includes a change to or from no tax being chargeable: Finance Act 1994 s 64, Sch 7 para 35(2).

4 Ibid Sch 7 para 35(1). Where this provision applies the amount of the premium is not treated as altered for the purposes of calculating tax: Sch 7 para 35(3).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/836. Accounting for tax and time for payment.

836. Accounting for tax and time for payment.

Regulations¹ may provide that a registrable person² must (1) account for tax by reference to such accounting periods³ as may be determined by or under the regulations⁴; (2) make, in relation to those periods, returns in such form as may be prescribed and at such times as may be so determined⁵; (3) pay tax at such times and in such manner as may be so determined⁶. Regulations may make provision establishing a special accounting scheme applicable to insurers⁷.

1 Any power to make regulations under the Finance Act 1994 Pt III (ss 48-74) (as amended) is exercisable by the Commissioners of Customs and Excise by statutory instrument and may be exercised as regards prescribed cases or descriptions of case, or may be exercised differently in relation to different cases or descriptions of case: s 74(2), (3), (7).

2 A 'registrable person' is a person who is registered under *ibid* ss 53 (as amended), 53AA (as added) or is liable to be registered under those sections: s 73(3), (3A) (amended and added respectively by the Finance Act 1997 s 27(1) (10)). As to the requirements relating to registration see *PARAS* 840-841 *post*.

3 'Accounting period' means such period for which a registrable person must account for tax: Finance Act 1994 s 54(a).

4 *Ibid* s 54(a).

5 *Ibid* s 54(b). 'Prescribed' means prescribed under the regulations: s 73(1).

6 *Ibid* s 54(c). As to the regulations made under s 54(a)-(c) see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 12-16; and *PARA* 837 *post*.

7 See the Finance Act 1994 s 68; and the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 20-28.

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/837. Accounting, payment and records.

837. Accounting, payment and records.

A registrable person¹ must in respect of each accounting period² make a return on the prescribed form³ not later than the last day of the month next following the end of the period to which it relates⁴. Unless the Commissioners otherwise allow or direct, any person required to make a return must pay any tax payable by him in respect of the accounting period to which the return relates no later than the last day on which he was required to make the return⁵. Every registrable person must, for the purpose of accounting for tax, keep and preserve specified records for a period of six years⁶. Where it appears to the Commissioners requisite to do so for the protection of the revenue they may require a registrable person, as a condition of his entering into taxable insurance contracts⁷, to give security, or further security, of such amount and in such manner as they may determine for the payment of any tax which is or may become due from him⁸.

1 For the meaning of 'registrable person' see PARA 836 note 2 ante.

2 For the meaning of 'accounting period' see PARA 836 note 3 ante.

3 Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 12(1). Special provision is made in relation to Lloyd's: see reg 12(2).

4 Ibid reg 12(3). Where the Commissioners consider it necessary in the circumstances of any particular case, they may (1) vary the length of any accounting period or the date on which it begins or ends or by which any return must be made; (2) allow or direct the registrable person to make a return in accordance with such a variation; (3) allow or direct a registrable person to make returns to a specified address; and any person to whom the Commissioners give any such direction must comply with it: reg 12(4). For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

5 Ibid reg 15.

6 Ibid reg 16(2). As to the power to make regulations requiring the keeping of records see the Finance Act 1994 Sch 7 para 1(1)-(3). The records to be kept are: (1) his business and accounting records; (2) policy documents, cover notes, endorsements and similar documents, and copies of such documents that are issued by him; (3) copies of all invoices, renewal notices and similar documents issued by him; (4) all credit or debit notes or other documents received by him which evidence an increase or decrease in the amount of any premium or fee, and copies of such documents that are issued by him; (5) such other records as the Commissioners may specify in a notice published by them and not withdrawn by them: Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 16(1)(a)-(e) (amended by SI 1997/1157). Any duty to preserve records may be discharged by the preservation of the information contained in them by such means as the Commissioners may approve; and where that information is so preserved a copy of any document forming part of the records will be admissible in evidence in any proceedings, whether civil or criminal, to the same extent as the records themselves: Finance Act 1994 s 64, Sch 7 para 1(4). The Commissioners may, as a condition of approving any means of preserving information contained in any records, impose such reasonable requirements as appear to them necessary for securing that the information will be as readily available to them as if the records themselves had been preserved: Sch 7 para 1(5). A statement contained in a document produced by a computer is not admissible in evidence in criminal proceedings except in accordance with the Criminal Justice Act 1988 Part II (ss 23-28) (as amended): Finance Act 1994 Sch 7 para 1(6)(b). As to the admissibility of evidence see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1359 et seq; and CIVIL PROCEDURE vol 11 (2009) PARAS 758-765.

7 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

8 Finance Act 1994 s 64, Sch 7 para 24.

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

837 Accounting, payment and records

NOTE 6--Finance Act 1994 Sch 7 para 1(3) amended, Sch 7 para 1(4)-(6) substituted: Finance Act 2009 Sch 50 para 1.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/838. Credit.

838. Credit.

Regulations¹ may provide that:

- 333 (1) where an insurer² or taxable intermediary³ has paid tax and all or part of the premium⁴ or taxable intermediary's fee⁵ is repaid, the insurer or taxable intermediary is to be entitled to credit of such an amount as is found in accordance with rules as prescribed in the regulations⁶;
- 334 (2) where tax is charged⁷ in relation to a premium which is shown in the accounts of an insurer as due to him, that tax is paid and it is shown to the satisfaction of the Commissioners⁸ that the premium, or part of it, will never actually be received by or on behalf of the insurer, the insurer is to be entitled to credit of such an amount as is found in accordance with rules as prescribed in the regulations⁹;
- 335 (3) where all or any of the tax payable in respect of a premium or taxable intermediary's fee has not been paid, and the circumstances are such that a person would be entitled to credit if the tax had been paid, adjustments as prescribed in the regulations are to be made as regards any amount of tax due from any person¹⁰.

Regulations may make provision as to the manner in which an insurer, or taxable intermediary, is to benefit from credit and in particular may make provision:

- 336 (a) that an insurer, or taxable intermediary, be entitled to credit by reference to accounting periods¹¹;
- 337 (b) that an insurer, or taxable intermediary, be entitled to deduct an amount equal to his total credit for an accounting period from the total amount of tax due from him for the period¹²;
- 338 (c) that if no tax is due from an insurer, or taxable intermediary, for an accounting period but he is entitled to credit for the period, the amount of the credit be paid to him by the Commissioners¹³;
- 339 (d) that if the amount of credit to which an insurer, or taxable intermediary, is entitled for an accounting period exceeds the amount of tax due from him for the period, an amount equal to the excess be paid to him by the Commissioners¹⁴;
- 340 (e) for the whole or part of any credit to be held over to be credited for a subsequent accounting period¹⁵;
- 341 (f) as to the manner in which a person who has ceased to be registrable¹⁶ is to benefit from credit¹⁷.

Any regulations under head (c) or head (d) above may provide that where, at the end of an accounting period, an amount is due to an insurer or taxable intermediary who has failed to submit returns for an earlier period¹⁸ the Commissioners may withhold payment of the amount until he has complied with that requirement¹⁹.

Regulations may provide that:

- 342 (i) no deduction or payment is to be made in respect of credit except on a claim made in such manner and at such time as may be determined by or under regulations²⁰;

- 343 (ii) payment in respect of credit is to be made subject to such conditions, if any, as the Commissioners think fit to impose including conditions as to repayment in specified circumstances²¹;
- 344 (iii) deduction in respect of credit is to be made subject to such conditions, if any, as the Commissioners think fit to impose including conditions as to the payment to the Commissioners, in specified circumstances, of an amount representing the whole or part of the amount deducted²².

Regulations may require a claim by an insurer or taxable intermediary to be made in a return²³.

1 As to the regulations made under the provisions set out in this paragraph see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 17-19 (as amended). As to the exercise of the power to make regulations see PARA 836 note 1 ante.

2 For the meaning of 'insurer' see PARA 831 note 3 ante.

3 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

4 For the meaning of 'premium' see PARA 833 ante.

5 'Taxable intermediary's fees' means fees which, to the extent of any payment in respect of them, are chargeable to tax by virtue of the Finance Act 1994 s 52A (as added and amended) (see PARA 834 ante): s 53AA(9) (added by the Finance Act 1997 s 26).

6 Finance Act 1994 s 55(1) (s 55 amended by the Finance Act 1997 s 27(3)); Finance Act 1994 s 73(1) (added by the Finance Act 1997 s 24(1)).

7 Ie by virtue of regulations made under the Finance Act 1994 s 68: see PARA 836 ante.

8 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

9 Finance Act 1994 ss 55(2), 73(1) (as added: see note 6 supra).

10 Ibid s 55(8) (as amended: see note 6 supra), s 73(1).

11 Ibid s 55(3)(a) (as amended: see note 6 supra). For the meaning of 'accounting period' see PARA 836 note 3 ante.

12 Ibid s 55(3)(b) (as amended: see note 6 supra).

13 Ibid s 55(3)(c) (as amended: see note 6 supra).

14 Ibid s 55(3)(d) (as amended: see note 6 supra).

15 Ibid s 55(3)(e). Regulations under this provision may provide for credit to be held over either on the insurer's or taxable intermediary's application or in accordance with general or special directions given by the Commissioners from time to time: s 55(5) (as amended: see note 6 supra).

16 Ie whether under ibid s 53 (as amended) or s 53AA (as added and amended) as to which see PARAS 840-841 post.

17 Ibid s 55(3)(f) (as amended: see note 6 supra).

18 Ie as required by ibid Pt III, (ss 48-74) (as amended).

19 Ibid s 55(4) (as amended: see note 6 supra).

20 Ibid s 55(6)(a).

21 Ibid s 55(6)(b).

22 Ibid s 55(6)(c).

23 le as required by provision made under ibid s 54 (as to which see PARA 836 ante): s 55(7) (as amended: see note 6 supra).

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(i) The Tax/839. Repayment of overpayments of tax.

839. Repayment of overpayments of tax.

If a person has paid an amount to the Commissioners¹ by way of tax which was not tax due to them, they are liable to repay the amount to him² on a claim being made for the purpose³. The Commissioners are not liable to repay any amount paid to them more than three years before the making of the claim⁴. It is a defence to a claim that repayment of an amount would unjustly enrich the claimant⁵. Except as already stated the Commissioners are not liable to repay an amount paid to them by way of tax by virtue of the fact that it was not tax due to them⁶. Where, due to an error on the part of the Commissioners, a person:

- 345 (1) has paid to them by way of tax an amount which was not tax due and which they are in consequence liable to repay to him⁷;
- 346 (2) has failed to claim payment of an amount to which he was entitled⁸; or
- 347 (3) has suffered delay in receiving payment of an amount due to him from them in connection with tax⁹,

then, if and to the extent that they would not be liable to do so apart from this provision, they must pay interest to him on that amount¹⁰.

1 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

2 Finance Act 1994 s 64, Sch 7 para 8(1).

3 Ibid Sch 7 para 8(2). A claim must be made in such form and manner and supported by such documentary evidence as may be prescribed by regulations: Sch 7 para 8(6). As to the prescribed requirements see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 19A-19H (added by SI 1998/60).

4 Finance Act 1994 Sch 7 para 8(4) (substituted by the Finance Act 1997 s 50, Sch 5 para 5(2)).

5 Finance Act 1994 Sch 7 para 8(3).

6 Ibid Sch 7 para 8(7).

7 Ibid Sch 7 para 22(1)(a).

8 Ie in pursuance of provision made under ibid s 55(3)(c), (d) or (f) (as amended) (as to which see PARA 838 text and notes 13, 14, 16-17 ante): Sch 7 para 22(1)(b).

9 Ibid Sch 7 para 22(1)(c).

10 Ibid Sch 7 para 22(1). As to the calculation of interest see Sch 7 paras 22, 23.

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

839 Repayment of overpayments of tax

TEXT AND NOTE 4--For 'three years' read 'four years': Finance Act 1994 Sch 7 para 8(4) (amended by Finance Act 2009 Sch 51 para 2) (in force 1 April 2011: SI 2010/867).

NOTE 10--Finance Act 1994 Sch 7 para 22 amended: Finance Act 2009 Sch 51 para 3 (in force 1 April 2011: SI 2010/867).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/840. Registration of insurers.

(ii) Registration and Liability for Tax

840. Registration of insurers.

A person who receives, as insurer¹, premiums² in the course of a taxable business³, and is not registered, is liable to be registered⁴. The Commissioners⁵ must register a person liable to be registered with effect from the time when he begins to receive premiums in the course of the business concerned⁶. A person who at any time forms the intention of receiving, as insurer, premiums in the course of a taxable business, and is not already doing so in the course of another taxable business, must notify the Commissioners of those facts⁷. A person who at any time ceases to have the intention of receiving, as insurer, premiums in the course of a taxable business, and has no intention of doing so in the course of another taxable business, must notify the Commissioners of those facts⁸ and, if satisfied as to the facts, they must cancel his registration with effect from the earliest practicable time after he ceases to receive, as insurer, premiums in the course of any taxable business⁹. In a case where the Commissioners are satisfied that a person has ceased to receive, as insurer, premiums in the course of any taxable business, but he has not notified them of this¹⁰ they may cancel his registration with effect from the earliest practicable time after he so ceased¹¹. Regulations may make provision:

- 348 (1) as to the time within which a notification is to be made;
- 349 (2) as to the circumstances in which premiums are to be taken to be received in the course of a taxable business;
- 350 (3) as to the form and manner in which any notification is to be made and as to the information to be contained in or provided with it;
- 351 (4) requiring a person who has made a notification to notify the Commissioners if any information contained in or provided in connection with it is or becomes inaccurate;
- 352 (5) as to the correction of entries in the register¹².

1 For the meaning of 'insurer' see PARA 831 note 3 ante.

2 References to receiving premiums are to receiving premiums on or after 1 October 1994: Finance Act 1994 s 53(7). For the meaning of 'premium' see PARA 833 ante.

3 'Taxable business' means a business which consists of or includes the provision of insurance under taxable insurance contracts: *ibid* s 73(1). For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

4 *Ibid* s 53(1).

5 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

6 Finance Act 1994 s 53(4). For the purposes of this provision it is immaterial whether or not the person notifies the Commissioners under s 53(2) (as to which see the text and note 7 *infra*): s 53(4). The register kept by the Commissioners must contain such information as they think is required for the purposes of the care and management of the tax: s 53(1A) (added by the Finance Act 1995 s 34, Sch 5 para 3).

7 Finance Act 1994 s 53(2).

8 *Ibid* s 53(3).

9 *Ibid* s 53(5) (amended by the Finance Act 1995 ss 34, 162, Sch 5 para 2(2), (4), Sch 29 Pt VII).

10 le under the Finance Act 1994 s 53(3): see the text and note 8 supra.

11 Ibid s 53(5A) (added by the Finance Act 1995 Sch 5 para 2(3)).

12 Finance Act 1994 s 53(6)(a)-(e). As to the regulations made under these provisions see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 4, 5, 6.

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/841. Registration of taxable intermediaries.

841. Registration of taxable intermediaries.

A person who is a taxable intermediary¹, and is not registered, is liable to be registered². Where a person is liable to be registered the Commissioners must register him with effect from the time when he begins to charge taxable intermediary's fees³ in the course of the business concerned⁴. A person who at any time forms the intention of charging taxable intermediary's fees, and is not already charging such fees in the course of another business, must notify the Commissioners of those facts⁵. A person who at any time ceases to have the intention of charging taxable intermediary's fees in the course of his business, and has no intention of charging such fees in the course of another business of his, must notify the Commissioners of those facts⁶, and where he satisfies the Commissioners of those facts they must cancel his registration with effect from the earliest practicable time after he ceases to charge taxable intermediary's fees in the course of any business of his⁷. In a case where the Commissioners are satisfied that a person has ceased to charge taxable intermediary's fees in the course of any business of his, but he has not notified them of this⁸, they may cancel his registration with effect from the earliest practicable time after he so ceased⁹. Regulations may make provision:

- 353 (1) as to the time within which a notification is to be made;
- 354 (2) as to the form and manner in which any notification is to be made and as to the information to be contained in or provided with it;
- 355 (3) requiring a person who has made a notification to notify the Commissioners if any information contained in or provided in connection with it is or becomes inaccurate;
- 356 (4) as to the correction of entries in the register¹⁰.

1 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

2 Finance Act 1994 s 53AA(1) (s 53AA added by the Finance Act 1997 s 26). The register kept under this provision may contain such information as the Commissioners think is required for the purposes of the care and management of the tax: Finance Act 1994 s 53AA(2) (as so added). For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

3 For the meaning of 'taxable intermediary's fees' see PARA 838 note 5 ante.

4 Finance Act 1994 s 53AA(5) (as added: see note 2 supra). For the purposes of this provision it is immaterial whether or not the person notifies the Commissioners under s 53AA(3) (as to which see the text and note 5 infra): s 53AA(5) (as so added).

5 Ibid s 53AA(3) (as added: see note 2 supra).

6 Ibid s 53AA(4) (as added: see note 2 supra).

7 Ibid s 53AA(6) (as added: see note 2 supra).

8 Ie under ibid s 53AA(4) (as added): see the text and note 6 supra.

9 Ibid s 53AA(7) (as added: see note 2 supra).

10 Ibid s 53AA(8)(a)-(e) (as added: see note 2 supra). As to the regulations made under these provisions see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 4A, 5, 6A (regs 4A, 6A added by SI 1997/1157; Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 5 substituted by SI 1995/1587 and amended by SI 1997/1157).

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/842. Information required to keep the register up to date.

842. Information required to keep the register up to date.

Regulations may make provision requiring a registrable person¹ to notify the Commissioners² of particulars which are of changes in circumstances relating to the registrable person or any business carried on by him, appear to the Commissioners to be required for the purpose of keeping the register up to date³, and are of a prescribed description⁴. Regulations may also make provision (1) as to the time within which a notification is to be made⁵, (2) as to the form and manner in which a notification is to be made⁶, (3) requiring a person who has made a notification to notify the Commissioners if any information contained in it is inaccurate⁷.

1 For the meaning of 'registrable person' see PARA 836 note 2 ante.

2 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

3 The register kept under Finance Act 1994 s 53 (as amended) or s 53AA (as added and amended): s 53A(1)(b) (s 53A added by the Finance Act 1995 s 34, Sch 5 para 4); see PARAS 840, 841 ante.

4 Finance Act 1994 s 53A(1)(a)-(c) (as added: see note 3 supra). 'Prescribed' means prescribed under the regulations: s 73(1). As to the regulations made under this provision see the Insurance Premium Tax (Amendment) Regulations 1995, SI 1995/1587, which amend the Insurance Premium Tax Regulations 1994, SI 1994/1774; as to the exercise of the power to make regulations see PARA 836 note 1 ante.

5 Finance Act 1994 s 53A(2)(a) (as added: see note 3 supra).

6 Ibid s 53A(2)(b) (as added: see note 3 supra).

7 Ibid s 53A(2)(c) (as added: see note 3 supra); as to the regulations made under s 53A(2)(a)-(c) see the Insurance Premium Tax (Amendment) Regulations 1995, SI 1995/1587, and the Insurance Premium Tax (Amendment) Regulations 1997, SI 1997/1157, which amend the Insurance Premium Tax Regulations 1994, SI 1994/1774. As to the exercise of the power to make regulations see PARA 836 note 1 ante.

UPDATE

836-842 Accounting for tax and time for payment ... Information required to keep the register up to date

Insurance Premium Tax Regulations 1994, SI 1994/1774, further amended: SI 2006/2700, SI 2008/2693.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/843. Groups of companies.

843. Groups of companies.

Two or more bodies corporate are eligible to be treated as members of a group if each of them is resident in the United Kingdom or it has an established place of business in the United Kingdom¹ and (1) one of them controls each of the others², (2) one person (whether a body corporate or an individual) controls all of them, or (3) two or more individuals carrying on a business in partnership control all of them³. Where an application to that effect is made to the Commissioners⁴ with respect to two or more bodies corporate eligible to be treated as members of a group then, unless the Commissioners refuse the application⁵, from the beginning of an accounting period⁶ they are to be so treated⁷ and one of them must be the representative member⁸. Where any bodies corporate are treated as members of a group and an application to that effect is made to the Commissioners, then, from the beginning of an accounting period:

- 357 (a) a further body eligible to be so treated may be included among the members of a group⁹;
- 358 (b) a body corporate may be excluded from the members of a group¹⁰;
- 359 (c) another member of the group may be substituted as the representative member¹¹; or
- 360 (d) the bodies corporate may no longer be treated as members of a group¹²;

unless, in the case of an application under head (a) or head (c), the Commissioners refuse the application¹³.

An application under these provisions with respect to any bodies corporate must be made by one of those bodies, or by the person controlling them, not less than 90 days before the date from which it is to take effect, or at such later time as the Commissioners may allow¹⁴.

Where any bodies corporate are treated as members of a group:

- 361 (i) any taxable business¹⁵ carried on by a member of the group will be treated as carried on by the representative member¹⁶;
- 362 (ii) any business carried on by a member of the group who is a taxable intermediary¹⁷ will be treated as carried on by the representative member¹⁸;
- 363 (iii) the representative member will be taken to be the insurer¹⁹ in relation to any taxable insurance contract²⁰ as regards which a member of the group is the actual insurer²¹;
- 364 (iv) the representative member will be taken to be the taxable intermediary in relation to any taxable intermediary's fees²² as regards which a member of the group is the actual taxable intermediary²³;
- 365 (v) any receipt by a member of the group of a premium²⁴ under a taxable insurance contract will be taken to be a receipt by the representative member²⁵; and
- 366 (vi) all members of the group are jointly and severally liable for any tax due from the representative member²⁶.

1 Finance Act 1994 s 63(3). For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

2 A body corporate is taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of the Companies Act 1985 s 736; and an individual or individuals will be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that section: Finance Act 1994 s 63(9); and see COMPANIES vol 14 (2009) PARA 25. Where a body corporate is treated as a member of a group as being controlled by any person and it appears to the Commissioners of Customs and Excise that it has ceased to be so controlled, they must, by notice given to that person, terminate that treatment from such date as may be specified in the notice: s 63(7). As to the service of notices see PARA 833 note 17 ante.

3 Ibid s 63(2).

4 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

5 The Commissioners must not refuse the application unless it appears to them necessary to do so for the protection of the revenue: Finance Act 1994 s 63(4).

6 For the meaning of 'accounting period' see PARA 836 note 3 ante; as to the provisions for accounting for tax see PARAS 836-837 ante.

7 Finance Act 1994 s 63(4)(a).

8 Ibid s 63(4)(b).

9 Ibid s 63(5)(a).

10 Ibid s 63(5)(b).

11 Ibid s 63(5)(c).

12 Ibid s 63(5)(d).

13 Ibid s 63(5). The Commissioners may refuse such an application only if it appears to them necessary to do so for the protection of the revenue: s 63(6).

14 Ibid s 63(8).

15 For the meaning of 'taxable business' see PARA 840 note 3 ante.

16 Finance Act 1994 s 63(1)(a).

17 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

18 Finance Act 1994 s 63(1)(aa) (s 63(1)(aa), (bb) added by the Finance Act 1997 s 27(8)).

19 For the meaning of 'insurer' see PARA 831 note 3 ante.

20 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

21 Finance Act 1994 s 63(1)(b).

22 For the meaning of 'taxable intermediary's fees' see PARA 838 note 5 ante.

23 Finance Act 1994 s 63(1)(bb) (as added: see note 18 supra).

24 For the meaning of 'premium' see PARA 833 ante.

25 Finance Act 1994 s 63(1)(c).

26 Ibid s 63(1)(d).

UPDATE

843 Groups of companies

NOTE 2--Reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159, Sch 6 (see COMPANIES vol 14 (2009) PARA 25); Finance Act 1994 s 63(9) (amended by SI 2009/1890).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/844. Lloyd's, partnership and unincorporated bodies; bankruptcy and transfers of business.

844. Lloyd's, partnership and unincorporated bodies; bankruptcy and transfers of business.

The registration¹ of an unincorporated body other than a partnership may be in the name of the body concerned, and in determining whether premiums² are received by such a body no account is to be taken of any change in its members³. Regulations may make provision for determining by whom anything required to be done by an insurer⁴ or taxable intermediary⁵ is to be done where the business concerned is carried on in partnership or by another unincorporated body⁶. Regulations may make provision for determining by whom anything required to be done by an insurer is to be done in a case where insurance business⁷ is carried on by persons who are underwriting members of Lloyd's and are members of a syndicate of such underwriting members⁸; make provision for the registration of a syndicate of underwriting members of Lloyd's⁹; and provide that for purposes prescribed by the regulations no account be taken of any change in the members of a syndicate¹⁰. In any case where a person carries on a business of an insurer or taxable intermediary who has died or become bankrupt or incapacitated, or of an insurer or taxable intermediary which is in liquidation or receivership or in relation to which an administration order is in force¹¹, regulations may:

- 367 (1) require the person to inform the Commissioners¹² of the fact that he is carrying on the business and of the event that has led to his carrying it on¹³;
- 368 (2) make provision allowing the person to be treated for a limited time as if he were the insurer or taxable intermediary¹⁴;
- 369 (3) make provision for securing continuity in the application of the statutory provisions where a person is so treated¹⁵.

Regulations may make provision for securing continuity in the application of the statutory provisions in cases where a business carried on by a person is transferred to another person as a going concern¹⁶ and may in particular provide (a) for liabilities and duties under the provisions of the transferor to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee¹⁷; (b) for any right of either of them to repayment or credit in respect of tax to be satisfied by making a repayment or allowing a credit to the other¹⁸.

1 As to registration see PARAS 840, 841 ante.

2 For the meaning of 'premium' see PARA 833 ante.

3 Finance Act 1994 s 62(2). As to unincorporated bodies see COMPANIES; as to partnerships see PARTNERSHIP.

4 For the meaning of 'insurer' see PARA 831 note 3 ante.

5 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

6 Finance Act 1994 s 62(1) (s 62(1), (5) amended by the Finance Act 1997 s 27(7)). As to the regulations made under this provision see the Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 10. As to the exercise of the power to make regulations see PARA 836 note 1 ante.

7 For the meaning of 'insurance business' see PARA 831 note 3 ante.

8 Finance Act 1994 s 62(3). As to Lloyd's see PARA 24 ante.

9 Ibid s 62(4)(a). The regulations under this provision may modify s 53 of the Act (as to which see PARA 840 ante): s 62(4).

10 Ibid s 62(4)(b). As to the regulations made under s 62(4)(a), (b) see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 8, 9.

11 Finance Act 1994 s 62(5) (as amended: see note 6 supra).

12 For the meaning of 'Commissioners' see PARA 831 note 10 ante.

13 Finance Act 1994 s 62(5)(a).

14 Ibid s 62(5)(b) (as amended: see note 6 supra).

15 Ibid s 62(5)(c). The statutory provisions are those of Pt III (ss 48-74) (as amended). As to the regulations made under s 62(5) see the Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 11 (amended by SI 1997/1157).

16 Finance Act 1994 s 62(6); and see note 15 supra.

17 Ibid s 62(7)(a).

18 Ibid s 62(7)(b). The regulations made under s 62(7)(a) or (b) may provide that no provision as is mentioned in either paragraph (a) or (b) have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations: s 62(7) proviso. As to the regulations made under these provisions see the Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 7. As to repayment of tax see PARA 839 ante; as to credit see PARA 838 ante.

UPDATE

844 Lloyd's, partnership and unincorporated bodies; bankruptcy and transfers of business

NOTE 15--SI 1994/1774 reg 11 further amended: SI 2003/2096.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/845. Appointment of tax representatives.

845. Appointment of tax representatives.

Where at any time a person who is an insurer¹ or taxable intermediary² is registered, or liable to be registered³, and does not have any business establishment or other fixed establishment in the United Kingdom⁴, provision is made with a view to securing that another person is the insurer's or taxable intermediary's tax representative at that time⁵. If, at the time he first falls within the statutory provisions, the insurer or taxable intermediary has a general representative⁶, the Commissioners⁷ are taken to approve that person at that time as the insurer's or taxable intermediary's tax representative, and that person will be his tax representative at any relevant time⁸ thereafter and before the Commissioners' approval is withdrawn⁹. If, at the time the insurer or taxable intermediary first falls within the provisions the insurer or taxable intermediary does not have a general representative, the insurer or taxable intermediary must¹⁰ request the Commissioners to approve a particular person as his tax representative, and make the request with a view to securing that a person approved by the Commissioners becomes his tax representative within the relevant period¹¹. Where the Commissioners approve the person put forward by the insurer or taxable intermediary that person will be the insurer's or taxable intermediary's tax representative at any relevant time falling after the Commissioners' approval is given and before their approval is withdrawn¹². Should the Commissioners believe that the revenue would not be sufficiently protected if a person were to become¹³, or were to continue, as the insurer's or taxable intermediary's tax representative¹⁴ they may require the insurer or taxable intermediary to put forward a person for their approval and the insurer or taxable intermediary must comply with that requirement¹⁵. In a case where an insurer's or taxable intermediary's tax representative notifies the Commissioners that:

- 370 (1) the insurer or taxable intermediary withdraws agreement that he should act as his tax representative; or
- 371 (2) he withdraws his agreement to act as the insurer's or taxable intermediary's tax representative; or
- 372 (3) he and the insurer or taxable intermediary agree that he should no longer be the insurer's or taxable intermediary's tax representative,

the Commissioners are taken to have withdrawn their approval of that person at the time they inform the insurer or taxable intermediary that they have received the notification, and at that time he ceases to be the insurer's or taxable intermediary's tax representative¹⁶.

An insurer or taxable intermediary may, otherwise than in pursuance of any statutory obligation¹⁷, request the Commissioners to approve a particular person as his tax representative, and if the Commissioners approve that person, he will be the insurer's or taxable intermediary's tax representative at any relevant time falling after the Commissioners' approval is given and before their approval is withdrawn¹⁸. The Commissioners may at any time direct that a person who is an agent of the insurer or taxable intermediary, and who is specified in the direction, is to be the insurer's or taxable intermediary's tax representative¹⁹ and the direction is to be taken to signify the Commissioners' approval of that person²⁰.

At the time when the Commissioners approve a person as the insurer's or taxable intermediary's tax representative they are to be taken to withdraw their approval of any person who was that tax representative immediately before the approval was given, and that person

then ceases to be the insurer's or taxable intermediary's tax representative²¹. The Commissioners may not withdraw their approval of a person as a tax representative except by virtue of the statutory provisions²². The fact that a person ceases to be an insurer's or taxable intermediary's tax representative does not prevent his subsequent approval under the statutory provisions²³.

1 For the meaning of 'insurer' see PARA 831 note 3 ante.

2 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

3 As to the registration of insurers see PARA 840 ante; and as to the registration of taxable intermediaries see PARA 841 ante.

4 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.

5 Finance Act 1994 s 57(1) (s 57(1)-(16) amended by the Finance Act 1997 s 27(4)).

6 'General representative' means a person resident in the United Kingdom who: (1) has been designated as the representative of the insurer or taxable intermediary; (2) is authorised to act generally, and to accept service of any document, on behalf of the insurer or taxable intermediary; and (3) fulfils the requirements of rules made under the Financial Services and Markets Act 2000 Pt 10 (ss 138-164); Finance Act 1994 s 57(16A) (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order, SI 2001/3649, art 345(1), (3)). As to the Financial Services and Markets Act 2000 Pt 10 see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 21 et seq.

7 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

8 Ie where the Finance Act 1994 s 57 (as amended) applies: see s 57(1) (as amended); and the text to note 5 supra.

9 Ibid s 57(2) (as amended (see note 5 supra); and further amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order, SI 2001/3649, art 345(1), (2)).

10 Finance Act 1994 s 57(3) (as amended (see note 5 supra); and further amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order, SI 2001/3649, art 345(1), (2)).

11 Finance Act 1994 s 57(4) (as amended: see note 5 supra). The relevant period is 30 days beginning with the day on which the insurer or taxable intermediary first falls within s 57(1) (as amended) but if the Commissioners allow a longer period the relevant period is that longer period: s 57(16)(a) (as amended: see note 5 supra). The Commissioners are taken to have given approval on the date they serve on the insurer or taxable intermediary a notice in writing confirming their approval or on such later date as may be specified in the notice: s 57(15)(a) (as amended: see note 5 supra); Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 29(1) (reg 29 amended by SI 1997/1157).

12 Finance Act 1994 s 57(5) (as amended: see note 5 supra).

13 Ie by virtue of ibid s 57(2) (as amended) (see the text and notes 6-9 supra): s 57(6)(a) (as amended: see note 5 supra).

14 Ie by virtue of any of the provisions of ibid s 57 (as amended): s 57(6)(b) (as amended: see note 5 supra).

15 See ibid s 57(4), (7) (as amended: see note 5 supra). Where s 57(4) (as amended) applies by virtue of s 57(7) (as amended), the relevant period is 30 days beginning with the day on which the requirement mentioned in s 57(7) (as amended) is made, or such longer period as the Commissioners may allow: see s 57(16)(b).

16 See ibid s 57(8) (as amended: see note 5 supra). In such a case the insurer or taxable intermediary must take action under s 57(4) (as amended) (see the text and notes 10-11 supra): s 57(9) (as amended: see note 5 supra). Where s 57(4) (as amended) applies by virtue of s 57(9) (as amended), the relevant period is the period of 30 days beginning with the day on which the person mentioned in s 57(8) (as amended) ceases to be the insurer's or taxable intermediary's tax representative, or such longer period as the Commissioners may allow: see s 57(16)(c) (as amended: see note 5 supra).

The Commissioners are taken to have informed the insurer they have received the notification on the date they serve on him a notice in writing to that effect: s 57(15)(b) (as amended: see note 5 supra); Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 29(2) (as amended: see note 11 supra).

17 le a duty under the Finance Act 1994 s 57(3) (as amended), s 57(7) (as amended) or s 57(9) (as amended): s 57(10)(a) (as amended: see note 5 supra).

18 See *ibid* s 57(10) (as amended: see note 5 supra). The Commissioners are taken to have given approval on the date they serve on the insurer or taxable intermediary a notice in writing confirming their approval or on such later date as may be specified in the notice: s 57(15)(a); Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 29(1) (as amended: see note 11 supra).

19 Finance Act 1994 s 57(11) (as amended: see note 5 supra).

20 *Ibid* s 57(11)(a) (as amended: see note 5 supra). The person specified will be the insurer's or taxable intermediary's tax representative at any relevant time falling after the Commissioners' direction is made and before their approval is withdrawn, but the direction does not prejudice any duty of the insurer or taxable intermediary under s 57(3) (as amended), s 57(7) (as amended) or s 57(9) (as amended): s 57(11)(b), (c) (as amended: see note 5 supra). Section 57(8) (as amended) (see the text and note 16 supra) does not apply in the case of the person specified in the direction: s 57(11)(d). The Commissioners are taken to have made the direction: (1) on the date they serve on both the insurer or taxable intermediary and the person who is to be his tax representative a notice in writing confirming that that person is to be his tax representative; (2) where the notices are served on different dates, on the later of them; or (3) where the notices specify a date falling after the date on which the later of them is served, on the date specified in the notices: s 57(15)(c); Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 29(3) (as amended: see note 11 supra).

21 Finance Act 1994 s 57(12) (as amended: see note 5 supra).

22 le by virtue of *ibid* s 57(8) (as amended) or s 57(12) (as amended): s 57(14) (as amended: see note 5 supra).

23 le by virtue of *ibid* s 57 (as amended): s 57(13) (as amended: see note 5 supra).

UPDATE

845-846 Appointment of tax representatives, Rights and duties of tax representatives

Repealed: Finance Act 2008 s 142(1)(a).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/846. Rights and duties of tax representatives.

846. Rights and duties of tax representatives.

A person who is an insurer's¹ or taxable intermediary's² tax representative³ at any time:

- 373 (1) is entitled to act on the insurer's or taxable intermediary's behalf for the purposes of legislation relating to insurance premium tax⁴,
- 374 (2) must secure (where appropriate by acting on the insurer's or taxable intermediary's behalf) the insurer's or taxable intermediary's compliance with and discharge of the obligations and liabilities to which the insurer or taxable intermediary is subject by virtue of legislation relating to insurance premium tax, including obligations and liabilities arising before he became that person's tax representative⁵, and
- 375 (3) will be personally liable in respect of any failure to secure the insurer's or taxable intermediary's compliance with or discharge of any such obligation or liability, and in respect of anything done for purposes connected with acting on the insurer's or taxable intermediary's behalf⁶,

as if the obligations and liabilities imposed on the insurer or taxable intermediary were imposed jointly and severally on that person and the tax representative⁷.

A tax representative is not, by virtue of the obligations imposed on him⁸, guilty of any offence except in so far as:

- 376 (a) he has consented to, or connived in, the commission of the offence by the insurer or taxable intermediary⁹,
- 377 (b) the commission of the offence by the insurer or taxable intermediary is attributable to any neglect on his part¹⁰, or
- 378 (c) the offence consists in a contravention by him of an obligation which is imposed both on him and on the insurer or taxable intermediary¹¹.

A tax representative is not liable¹² himself to be registered¹³ but regulations may (i) require the registration of the names of tax representatives against the names of the insurers in any register kept¹⁴; (ii) make provision for the deletion of the names of persons who cease to be tax representatives¹⁵.

1 For the meaning of 'insurer' see PARA 831 note 3 ante.

2 For the meaning of 'taxable intermediary' see PARA 834 note 17 ante.

3 As to the appointment of tax representatives see PARA 845 ante.

4 Finance Act 1994 s 58(1)(a) (s 58(1), (3) amended by the Finance Act 1997 s 27(5)).

5 Finance Act 1994 s 58(1)(b) (as amended: see note 4 supra). This has effect subject to such provisions as may be made by regulations: s 58(4). A tax representative will not be jointly and severally liable with the insurer or taxable intermediary, or be required to secure the insurer's or taxable intermediary's compliance with or the discharge of his obligation, in relation to any requirement to make a notification of liability to register or to be deregistered: Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 31 (amended by SI 1997/1157).

- 6 Finance Act 1994 s 58(1)(c) (as amended: see note 4 supra).
- 7 Ibid s 58(1) (as amended: see note 4 supra).
- 8 Ie under ibid s 58(1): see the text and notes 1-7 supra).
- 9 Ibid s 58(3)(a) (as amended: see note 4 supra).
- 10 Ibid s 58(3)(b) (as amended: see note 4 supra).
- 11 Ibid s 58(3)(c) (as amended: see note 4 supra).
- 12 Ie by virtue of ibid s 58(1): see the text and notes 1-7 supra.
- 13 Ie under ibid Pt III (ss 48-74) (as amended). As to registration see PARAS 840-841 ante.
- 14 Ibid s 58(2)(a).
- 15 Ibid s 58(2)(b); and see the Insurance Premium Tax Regulations 1994, SI 1994/1774, reg 30 (amended by SI 1997/1157).

UPDATE

845-846 Appointment of tax representatives, Rights and duties of tax representatives

Repealed: Finance Act 2008 s 142(1)(a).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/847. Liability of the insured.

847. Liability of the insured.

Where at any time an insurer¹ does not have any business establishment or other fixed establishment in the United Kingdom², and no person is the insurer's tax representative³ regulations may make provision⁴:

- 379 (1) allowing notice to be served in accordance with the regulations on the person who is insured under a taxable insurance contract⁵ if there is one insured person, or one or more of the persons who are insured if there are two or more insured persons⁶;
- 380 (2) that if a liability notice⁷ has been served the Commissioners⁸ may assess to the best of their judgment the amount of any tax due in respect of premiums⁹ received by the insurer under the contract concerned after the material date and before the date of the assessment, and that amount is deemed to be the amount of tax so due¹⁰;
- 381 (3) that where an assessment is made in respect of a contract¹¹ and the assessment is notified to the person, or each of the persons, on whom a liability notice in respect of the contract has been served¹², that person, or those persons, and the insurer are to be jointly and severally liable to pay the tax assessed¹³;
- 382 (4) as to the time within which, and the manner in which, tax which has been assessed is to be paid¹⁴;
- 383 (5) for adjustments to be made of a person's liability in any case where an assessment is made¹⁵ in relation to the insurer, and an assessment made by virtue of the regulations relates to premiums received, or assumed for the purposes of the assessment to be received, within a period which corresponds to any extent with the accounting period to which the former assessment relates¹⁶;
- 384 (6) as regards a case where an assessment made in respect of a contract by virtue of the regulations relates to premiums received, or assumed for the purposes of the assessment to be received, within a given period, and an amount of tax is paid by the insurer in respect of an accounting period which corresponds to any extent with that period¹⁷;
- 385 (7) requiring the Commissioners, in prescribed circumstances, to furnish prescribed information to an insured person¹⁸;
- 386 (8) requiring any person on whom a liability notice has been served to keep records, to furnish information, or to produce documents for inspection or cause documents to be produced for inspection¹⁹;
- 387 (9) such provision as the Commissioners think is reasonable for the purpose of facilitating the recovery of tax from the persons having joint and several liability, rather than from the insurer alone²⁰;
- 388 (10) modify the effect of any provision of Part III of the Finance Act 1994²¹;
- 389 (11) provide for an insured person to be liable to pay tax assessed by virtue of the regulations notwithstanding that he has already paid an amount representing tax as part of a premium²².

Where any amount is recovered from an insured person by virtue of any such regulations the insurer is liable to pay to the insured person an amount equal to the amount recovered and the regulations may make provision requiring an insurer to pay interest on that sum²³.

- 1 For the meaning of 'insurer' see PARA 831 note 3 ante.
- 2 For the meaning of 'United Kingdom' see PARA 8 note 3 ante.
- 3 Ie by virtue of Finance Act 1994 s 57 (as amended) (as to which see PARA 845 ante): s 65(1).
- 4 As to the regulations made under these provisions see the Insurance Premium Tax Regulations 1994, SI 1994/1774, regs 32-41; as to the exercise of the power to make regulations see PARA 836 note 1 ante.
- 5 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.
- 6 Finance Act 1994 s 65(2)(a), (b). A notice so served is known as a liability notice: s 65(2).
- 7 For the meaning of 'liability notice' see note 6 supra.
- 8 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.
- 9 For the meaning of 'premium' see PARA 833 ante.
- 10 Finance Act 1994 s 65(3). The material date is: (1) where there is one person on whom a liability notice has been served in respect of the contract, the date when the notice was served or such later date as may be specified in the notice; (2) where there are two or more persons on whom liability notices have been served in respect of the contract, the date when the last of the notices was served or such later date as may be specified in the notices: s 65(4).
- 11 Ie under provision included in the regulations by virtue of *ibid* s 65(3): s 65(5)(a); see the text and notes 7-10 supra.
- 12 *Ibid* s 65(5)(b). Where regulations make provision under s 65(5) they must also provide that any such provision will not apply if, or to the extent that, the assessment has subsequently been withdrawn or reduced: s 65(7).
- 13 *Ibid* s 65(6).
- 14 *Ibid* s 65(8).
- 15 Ie under *ibid* s 56: see PARA 848 post.
- 16 *Ibid* s 65(10). For the meaning of 'accounting period' see PARA 836 note 3 ante.
- 17 *Ibid* s 65(11). The regulations may include provision for determining whether, or how much of, any of the tax paid by the insurer is attributable to premiums received under the contract in the given period: s 65(11).
- 18 *Ibid* s 65(12)(a). 'Prescribed' means as prescribed by the regulations: s 73(1).
- 19 *Ibid* s 65(12)(b).
- 20 *Ibid* s 65(12)(c).
- 21 *Ibid* s 65(12)(d). Part III comprises ss 48-74 (as amended).
- 22 *Ibid* s 65(13).
- 23 *Ibid* s 65(9).

UPDATE

847 Liability of the insured

TEXT AND NOTES 1-4--Such regulations may now be made where at any time the insurer (1) does not have any business establishment or other fixed establishment in the United Kingdom; and (2) is established in a country or territory in respect of which it appears to the Commissioners for Her Majesty's Revenue and Customs that (a) the

country or territory is neither a member state nor part of a member state; and (b) there is no provision for mutual assistance between the United Kingdom and the country or territory similar in scope to the assistance provided for between the United Kingdom and each other member state by the mutual assistance provisions: Finance Act 1994 s 65(1), (1A) (s 65(1) amended, s 65(1A), (1B) added, by Finance Act 2008 ss 142(1)(b), 143). The 'mutual assistance provisions' means the Finance Act 2002 s 134, Sch 39 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1832) and the Finance Act 2003 s 197 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1833): Finance Act 1994 s 65(1B). Reference to s 57 (repealed) omitted: see s 65(1).

NOTE 4--SI 1994/1774 regs 29-31 revoked, reg 33 amended: SI 2008/1945.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(1) CHARGE TO TAX; PERSONS CHARGEABLE/(ii) Registration and Liability for Tax/848. Power to assess tax.

848. Power to assess tax.

The Commissioners¹ may assess the amount of tax due from the person concerned to the best of their judgment and notify it to him² where:

- 390 (1) a person has failed to make any required returns³,
- 391 (2) a person has failed to keep any documents necessary to verify any returns⁴,
- 392 (3) a person has failed to afford the facilities necessary to verify any returns⁵, or
- 393 (4) it appears to them that returns are incomplete or incorrect⁶.

Where a person has for an accounting period⁷ been paid an amount to which he purports to be entitled under regulations relating to claims in respect of credit⁸, then, to the extent that the amount ought not to have been paid or would not have been paid had the facts been known or been as they later turn out to be, the Commissioners may assess the amount as being tax due from him for that period and notify it to him accordingly⁹.

An assessment under these provisions may not be made after the later of either two years after the end of the accounting period¹⁰, or one year after evidence of facts, sufficient in the Commissioners' opinion to justify the making of the assessment, comes to their knowledge¹¹. Where an amount has been assessed and notified to any person it is deemed to be an amount of tax due from him and may be recovered accordingly unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced¹². If (a) the Commissioners have made an assessment as a result of a person's failure to make a return for an accounting period¹³, (b) the tax assessed has been paid but no proper return has been made for the period to which the assessment related¹⁴, and (c) as a result of a failure to make a return for a later accounting period by that person, or a person acting in a representative capacity in relation to him¹⁵, the Commissioners find it necessary to make another assessment¹⁶ then, if the Commissioners think fit having regard to the first failure, they may specify in the latter assessment an amount of tax greater than that which they would otherwise have considered to be appropriate¹⁷.

Where an assessment is made under any of these provisions the amount assessed carries interest¹⁸.

1 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

2 Finance Act 1994 s 56(1).

3 Ibid s 56(1)(a).

4 Ibid s 56(1)(b).

5 Ibid s 56(1)(c).

6 Ibid s 56(1)(d). If the person failing to make a return, or making a return which appears to the Commissioners to be incomplete or incorrect, was required to make the return as a personal representative, trustee in bankruptcy, receiver, liquidator or person otherwise acting in a representative capacity in relation to another person, the provisions of s 56(1) apply as if the reference to tax due from him included a reference to tax due from that other person: s 56(4). Notification to a personal representative, trustee in bankruptcy, receiver, liquidator or person otherwise acting in a representative capacity is treated as notification to the

person in relation to whom that person acts: s 56(8). As to the making of returns and the keeping of records see PARA 837 ante.

7 For the meaning of 'accounting period' see PARA 836 note 3 ante.

8 As to such regulations see PARA 838 ante.

9 Finance Act 1994 s 56(2). Where a person is assessed under s 56(1) and s 56(2) in respect of the same accounting period the assessments may be combined and notified to him as one assessment: s 56(3).

10 Ibid s 56(5)(a).

11 Ibid s 56(5)(b). However, where further such evidence comes to the Commissioners knowledge after the making of an assessment under s 56(1) or s 56(2) another assessment may be made under the relevant provision in addition to any earlier assessment: s 56(5).

12 Ibid s 56(7).

13 Ibid s 56(6)(a).

14 Ibid s 56(6)(b).

15 Ie in a capacity as set out in ibid s 56(8): see note 5 supra.

16 Ibid s 56(6)(c).

17 Ibid s 56(6).

18 See ibid s 64, Sch 7 para 21 (amended by the Finance Act 1996 ss 197(6)(b), (7), 205, Sch 41 Pt VIII(1)).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(2) DECISIONS AND APPEALS/849. Review of Commissioners' decisions.

(2) DECISIONS AND APPEALS

849. Review of Commissioners' decisions.

Any person who is, or will be, affected by specified decisions of the Commissioners¹ may by notice in writing to the Commissioners require them to review the decision². The specified decisions are any decision of the Commissioners with respect to:

- 394 (1) the registration or cancellation of registration of any person³;
- 395 (2) whether tax is chargeable in respect of a premium⁴ or how much tax is chargeable⁵;
- 396 (3) whether a payment falls to be treated as a premium received under a taxable insurance contract⁶ by an insurer⁷ and chargeable to tax at the higher rate⁸;
- 397 (4) whether a person is entitled to credit or how much credit a person is entitled to or the manner in which he is to benefit from credit⁹;
- 398 (5) an assessment as to the amount of tax or the amount of such an assessment¹⁰;
- 399 (6) any refusal of an application relating to groups of companies¹¹;
- 400 (7) whether a notice may be served on a person relating to the liability of an insured person¹²;
- 401 (8) an assessment or the amount of an assessment relating to the liability of an insured person¹³;
- 402 (9) whether a special accounting scheme applies to an insurer as regards an accounting period¹⁴;
- 403 (10) the requirement of any security or its amount¹⁵;
- 404 (11) any liability to a penalty¹⁶;
- 405 (12) the amount of any penalty or interest specified in an assessment¹⁷;
- 406 (13) a claim for the repayment¹⁸;
- 407 (14) any liability of the Commissioners to pay interest or the amount of the interest payable¹⁹.

The Commissioners must give written notification of any specified decision to any person who requests such a notification, has not previously been given written notification of that decision, and if given such a notification will be entitled to require a review of the decision²⁰. The Commissioners are not required to review any decision unless the notice requiring the review is given within 45 days of the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review²¹. A person is entitled to give a notice requiring a decision to be reviewed for a second or subsequent time only if:

- 408 (a) the grounds on which he requires the further review are that the Commissioners did not, on any previous review, have the opportunity to consider certain facts or other matters, and
- 409 (b) he does not, on the further review, require the Commissioners to consider any facts or matters which were considered on a previous review except in so far as they are relevant to any issue not previously considered²².

Where the Commissioners are required to review any decision they have a duty to do so and on the review they may withdraw, vary or confirm the decision²³. If, within 45 days of the day on which the review was required, they do not give notice to the person requiring it of their determination on the review, they are to be assumed to have confirmed the decision²⁴.

1 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

2 Finance Act 1994 s 59(2).

3 Ibid s 59(1)(a). As to the registration of insurers see PARA 840 ante; as to the registration of taxable intermediaries see PARA 841 ante.

4 For the meaning of 'premium' see PARA 833 ante.

5 Finance Act 1994 s 59(1)(b). Those affected by a ruling of the Commissioners on the chargeability of tax are entitled to bring and maintain an appeal under s 59(1)(b) irrespective of whether they or others had brought or were entitled to bring in addition an appeal under s 59(1)(l) (as to which see text and note 18 infra): *Customs and Excise Comrs v Cresta Holidays Ltd* [2001] EWCA Civ 215, [2001] STC 386.

6 For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante.

7 For the meaning of 'insurer' see PARA 831 note 3 ante.

8 Finance Act 1994 s 59(1)(bb) (added by the Finance Act 1997 s 27(6)). As to premiums liable to tax at the higher rate see PARA 834 ante.

9 Finance Act 1994 s 59(1)(c). As to credit see PARA 838 ante.

10 Ie an assessment under ibid s 56 (as to which see PARA 848 ante): s 59(1)(d), (1A) (amended and added respectively by the Finance Act 1995 s 34, Sch 5 para 5(2)-(4)).

11 Ie under the Finance Act 1994 s 63 (as amended) (as to which see PARA 843 ante): s 59(1)(e).

12 Ibid s 59(1)(f). As to the liability of insured persons see PARA 847 ante.

13 Ibid s 59(1)(g).

14 Ibid s 59(1)(h). As to special accounting schemes see PARA 836 text and note 7 ante.

15 Ie under ibid Sch 7 para 24: s 59(1)(i); and see PARA 837 text and notes 7, 8 ante.

16 Ie under ibid Sch 7 paras 12-19 (as amended): s 59(1)(j); and see PARA 854 post.

17 Ie under ibid Sch 7 para 25: s 59(1)(k).

18 Ie under ibid Sch 7 para 8: s 59(1)(l); and see PARA 839 ante. Only a taxpayer may claim a repayment and make an appeal under this ground: *Customs and Excise Comrs v Cresta Holidays Ltd* [2001] EWCA Civ 215, [2001] STC 386.

19 Ie under the Finance Act 1994 Sch 7 para 22 (as amended): s 59(1)(m); and see PARA 839 ante.

20 Ibid s 59(4).

21 Ibid s 59(3).

22 Ibid s 59(5).

23 Ibid s 59(6). The Commissioners do not, when reviewing a decision, have any power to mitigate the amount of any penalty imposed apart from their power under Sch 7 para 13: s 59(8); and see PARA 854 text and notes 8-11 post.

24 Ibid s 59(7). As to the service of notices see PARA 833 note 17 ante.

UPDATE

849 [Appeals]

TEXT AND NOTES 1, 2--Repealed: SI 2009/56.

TEXT AND NOTES 3-14--Subject to the Finance Act 1994 s 60 (see PARA 850), an appeal lies to an appeal tribunal from any person who is or will be affected by any decision of Her Majesty's Revenue and Customs with respect to any of the matters in heads (1)-(14): s 59(1) (amended by SI 2009/56).

An appeal under the Finance Act 1994 s 59 must be made to the appeal tribunal before the end of the period of 30 days beginning with (1) (a) in a case where the appellant is the person (P) to whom notice of the decision has been given, the date of the document in which he was so notified; and (b) in any other case, the date when the person concerned became aware of the decision; or (2) if later, the end of the relevant period (ie the period of 30 days from the acceptance of Her Majesty's Revenue and Customs' offer of a review or from the appellant's request for a review): s 59G(1), (2) (ss 59A-59G added by SI 2009/56). In a case where Her Majesty's Revenue and Customs is required to undertake a review under the Finance Act 1994 s 59C, an appeal may not be made until the conclusion date; and must then be made within the period of 30 days beginning with that date; and where a review is requested under s 59E, an appeal may not be made unless Her Majesty's Revenue and Customs has decided not to undertake a review or, if a review is undertaken, until the conclusion date, and must then be made within the period of 30 days beginning with the date on which the decision was made or, as the case may be, with the conclusion date: s 59G(3), (4). Where no notice is given of the conclusions of a review by Her Majesty's Revenue and Customs, it is treated as having confirmed the decision and Her Majesty's Revenue and Customs is then required to give notice of the conclusion which is treated as having been so reached: s 59G(5). In such a case, an appeal may be made at any time from the end of the period of 45 days (or such longer period as Her Majesty's Revenue and Customs may allow) beginning with the date on which the offer of review was accepted, the request for review was made, or the decision not to review was taken, to the date 30 days after the conclusion date. In each case, the appeal tribunal may extend the period: s 59G(5), (6). 'Conclusion date' means the date of the document notifying the conclusion of the review: s 59G(7). Detailed provision similar to that made more generally for customs and excise purposes by ss 15A-15F (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1240) is made for insurance premium tax purposes by ss 59A-59F.

TEXT AND NOTES 15-24--Repealed: SI 2009/56.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(2) DECISIONS AND APPEALS/850. Appeals.

850. Appeals.

An appeal lies to an appeal tribunal¹ with respect to any decision by the Commissioners² on a review³, including a deemed confirmation⁴, and any decision by the Commissioners on a review of a decision which they have agreed to undertake following a request made out of time⁵. A tribunal has no power to vary an amount assessed by way of penalty or interest except in so far as it is necessary to reduce it to the amount which is appropriate under the relevant statutory provisions⁶. Where an appeal is made by a person who is required to make returns⁷ the appeal will not be entertained unless the appellant has made all the returns which he is required to make⁸, and has paid the amounts shown in those returns as payable by him⁹. Where the appeal is against a decision with respect to whether tax is chargeable in respect of a premium or how much tax is chargeable¹⁰, or an assessment as to the amount of tax or the amount of such an assessment¹¹ it will not be entertained unless the amount which the Commissioners have determined to be payable as tax has been paid or deposited with them¹², or on being satisfied that the appellant would otherwise suffer hardship the Commissioners agree or the tribunal decides that it should be entertained notwithstanding that that amount has not been so paid or deposited¹³. Where on an appeal against a decision with respect to an assessment as to the amount of tax or the amount of such an assessment¹⁴ it is found that the amount specified in the assessment is less than it ought to have been, and the tribunal gives a direction specifying the correct amount, the assessment is to have effect as an assessment of the amount specified in the direction and that amount is deemed to have been notified to the appellant¹⁵. Where on an appeal it is found that the whole or part of any credit¹⁶ due to the appellant has not been paid, so much of that amount as is found not to have been paid must be paid with interest at such rate as the tribunal may determine¹⁷.

1 'Appeal tribunal' means a VAT and duties tribunal: Finance Act 1994 s 73(1). As to such a tribunal see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 343 et seq.

2 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

3 I.e. a review under the Finance Act 1994 s 59 (as amended): see PARA 849 ante.

4 I.e. under *ibid* s 59(7) (see PARA 849 text and note 24 ante): s 60(1)(a).

5 *Ibid* s 60(1)(b). As to the time limit for requesting a review of a decision see PARA 849 text and note 21 ante. On an appeal against an assessment to a penalty under Sch 7 para 12 (see PARA 854 post) the burden of proof as to the matters specified in Sch 7 para 12(1)(a), (b) lies upon the Commissioners: s 60(9). The Finance Act 1985 ss 25, 29 in respect of the settling of appeals by agreement and enforcement of certain decisions of a tribunal has effect in relation to these provisions: see Finance Act 1994 s 60(10).

6 I.e. under *ibid* Sch 7 paras 12-21 (as amended): s 60(2).

7 I.e. by virtue of regulations made under *ibid* s 54: see PARA 836 ante.

8 *Ibid* s 60(3)(a).

9 *Ibid* s 60(3)(b). This restriction does not apply in the case of an appeal against a decision with respect to the matter mentioned in s 59(1)(i) (see PARA 849 text and note 15 ante): s 60(3).

10 I.e. under *ibid* s 59(1)(b): see PARA 849 text and note 5 ante.

11 I.e. under *ibid* s 59(1)(d): see PARA 849 text and note 10 ante.

12 Ibid s 60(4)(a). Where on appeal it is found that the whole or part of any amount paid or deposited is not due, so much of that amount as is found not to be due must be repaid with interest at such rate as the tribunal may determine: s 60(6).

13 Ibid s 60(4)(b). Where an appeal has been entertained notwithstanding that an amount determined by the Commissioners to be payable as tax has not been paid or deposited and it is found on the appeal that that amount is due the tribunal may, if it thinks fit, direct that that amount must be paid with interest at such rate as may be specified in the direction: s 60(8).

14 Ie under ibid s 59(1)(d): see PARA 849 text and note 10 ante.

15 Ibid s 60(5).

16 Ie following an appeal under ibid s 59(1)(c): see PARA 849 text and note 9 ante.

17 Ibid s 60(7).

UPDATE

850 [Further provisions relating to] appeals

TEXT AND NOTES 1-9--Finance Act 1994 s 60(1), (3) repealed: SI 2009/56.

TEXT AND NOTE 6--Finance Act 1994 s 60(2) amended: SI 2009/56.

TEXT AND NOTES 10-17--Subject to the Finance Act 1994 s 60(4A), (4B), where the appeal is against the decisions with respect to the matters mentioned in s 59(1)(b), (d) (see PARA 849 heads (2), (4)), it cannot be entertained unless the amount which Her Majesty's Revenue and Customs has determined to be payable as tax has been paid or deposited with it; but in a case where no such amount has been paid or deposited, an appeal remains open if Her Majesty's Revenue and Customs is satisfied (on the application of the appellant) or, where it is not so satisfied and again on the application of the appellant, the appeal tribunal decides, that the requirement to make a payment or deposit would cause the appellant to suffer hardship: s 60(4)-(4B) (substituted by SI 2009/56). Notwithstanding the provisions of the Tribunals, Courts and Enforcement Act 2007 ss 11 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.7), 13 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.8), the decision of the appeal tribunal on the question of hardship is final: Finance Act 1994 s 60(4B).

NOTE 1--'Appeal tribunal' now means the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal: Finance Act 1994 s 73(1) (amended by SI 2009/56).

NOTE 5--The Value Added Tax Act 1994 ss 85, 85B (see VALUE ADDED TAX) have effect as if the references to s 83 included references to the Finance Act 1994 s 59 (see PARA 849), and references to value added tax included references to insurance premium tax: s 60(10) (substituted by SI 2009/56).

TEXT AND NOTES 12, 13, 17--The rate of interest is now that applicable under the Finance Act 1996 s 197 (see LANDFILL TAX vol 61 (2010) PARA 1001): Finance Act 1994 s 60(7) (amended by SI 2009/56). Reference to Commissioners is now to Her Majesty's Revenue and Customs': Finance Act 1994 s 60(8), (9) (amended by SI 2009/56). Interest under the Finance Act 1994 s 60(8) must be paid without any deduction of income tax: s 60(8A) (added by SI 2009/56).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(3) POWERS AND OFFENCES/(i) Powers of the Commissioners of Customs and Excise/851. Power to require information and documents.

(3) POWERS AND OFFENCES

(i) Powers of the Commissioners of Customs and Excise

851. Power to require information and documents.

Every person who is concerned, in whatever capacity, in an insurance business¹ must furnish to the Commissioners² such information relating to contracts of insurance entered into in the course of the business as the Commissioners may reasonably require³, and must on demand made by an authorised person⁴ produce or cause to be produced for inspection by that person any documents relating to such contracts⁵. Every person who makes arrangements for other persons to enter into any contract of insurance must furnish to the Commissioners such information relating to that contract as the Commissioners may reasonably require⁶, and must on demand made by an authorised person produce or cause to be produced for inspection by that person any documents relating to that contract⁷. Every person who is concerned in a business that is not an insurance business and who has been involved in the entry into any contract of insurance providing cover for any matter associated with the business, must furnish to the Commissioners such information relating to that contract as the Commissioners may reasonably require⁸, and must on demand made by an authorised person produce or cause to be produced for inspection by that person any documents relating to that contract⁹. The information referred to in these provisions is to be furnished within such time and in such form as the Commissioners may reasonably require¹⁰, and an authorised person who has power to require the production of any documents may also require production of the documents concerned from any other person who appears to him to be in possession of them¹¹. Any documents demanded by an authorised person must be produced at the principal place of business of the person on whom the demand is made, or at such other place as the authorised person may reasonably require, and at such time as he may reasonably require¹². An authorised person may take copies of, or make extracts from, any document produced¹³ and, if it appears to him to be necessary to do so, he may, at a reasonable time and for a reasonable period, remove any such document¹⁴.

Where, on an application by an authorised person, a justice of the peace is satisfied that there are reasonable grounds for believing (1) that an offence in connection with tax is being, has been or is about to be committed¹⁵, and (2) that any recorded information, including any document of any nature whatsoever, which may be required as evidence for the purpose of any proceedings in respect of such an offence is in the possession of any person¹⁶, he may make an order¹⁷ that that person must give an authorised person access to it¹⁸, and permit an authorised person to remove and take away any of it which he reasonably considers necessary¹⁹.

1 For the meaning of 'insurance business' see PARA 831 note 3 ante.

2 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

3 Finance Act 1994 s 64, Sch 7 para 2(1) (Sch 7 paras 2, 3 amended by the Finance Act 1995 s 34, Sch 5 para 7).

4 'Authorised person' means any person acting under the authority of the Commissioners of Customs and Excise: Finance Act 1994 s 73(1).

5 Ibid Sch 7 para 3(1) (as amended: see note 3 supra).

6 Ibid Sch 7 para 2(2) (as amended: see note 3 supra).

7 Ibid Sch 7 para 3(2) (as amended: see note 3 supra).

8 Ibid Sch 7 para 2(3) (as amended: see note 3 supra).

9 Ibid Sch 7 para 3(3) (as amended: see note 3 supra).

10 Ibid Sch 7 para 2(4).

11 Ibid Sch 7 para 3(4). Where any such other person claims a lien on any document produced by him, the production is without prejudice to the lien: Sch 7 para 3(4). As to liens see LIEN.

12 Ibid Sch 7 para 3(5).

13 Ibid Sch 7 para 3(6).

14 Ibid Sch 7 para 3(7). He must on request provide a receipt for any document removed and where a lien is claimed on a document produced the removal of the document is not regarded as breaking the lien: Sch 7 para 3(7). Where a document removed is reasonably required for the proper conduct of a business the authorised person must as soon as practicable provide a copy of the document free of charge to the person by whom it was produced or caused to be produced: Sch 7 para 3(8). Where any documents removed under these powers are lost or damaged the Commissioners are liable to compensate their owner for any expenses reasonably incurred by him in replacing or repairing the documents: Sch 7 para 3(9).

15 Ibid Sch 7 para 4A(1)(a) (Sch 7 para 4A added by the Finance Act 1995 Sch 5 paras 1, 8(1)).

16 Finance Act 1994 Sch 7 para 4A(1)(b) (as added: see note 15 supra).

17 Ibid Sch 7 para 4A(1) (as added: see note 15 supra). As to the making of orders by a justice of the peace see MAGISTRATES vol 29(2) (Reissue) PARAS 535, 827.

18 Ibid Sch 7 para 4A(2)(a) (as added: see note 15 supra). The authorised person must also be permitted to take copies of the information or to make extracts from it: Sch 7 para 4A(3) (as so added). Where the recorded information consists of information contained in a computer an order has effect as an order to produce the information in a form in which it is visible and legible and, if the authorised person wishes to remove it, in a form in which it can be removed: Sch 7 para 4A(4) (as so added; as from a day to be appointed the words 'stored in any electronic form' are substituted for the words 'contained in a computer' and the words 'or from which it can readily be produced in a visible and legible form' are added after the words 'visible and legible': Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 13(1), (2)(g)). At the date at which this volume states the law, no such day had been appointed.

19 Finance Act 1994 Sch 7 para 4A(2)(b) (as added: see note 15 supra). The person must comply with the order not later than the end of the period of 7 days beginning on the date of the order or the end of any longer period as the order may specify: see Sch 7 para 4A(2) (as so added). An authorised person who removes anything in the exercise of a power under these provisions must, if so requested by a person showing himself to be the occupier of premises from which it was removed, or to have had custody or control of it immediately before the removal, provide that person with a record of what he removed within a reasonable time from the making of the request: Sch 7 para 5(1), (2) (para 5(1) amended by the Finance Act 1995 Sch 5 paras 1, 8(2)). If a request for permission to be allowed access to anything which has been removed by an authorised person, and is retained by the Commissioners for the purposes of investigating an offence, is made to the officer in overall charge of the investigation by a person who had custody or control of the thing immediately before it was so removed or by someone acting on behalf of such a person, the officer must allow the person who made the request access to it under the supervision of an authorised person subject to and in accordance with the provisions of the Finance Act 1994 Sch 7 para 5(4)-(8): see Sch 7 para 5(3). A failure by an authorised person to comply with a requirement imposed by Sch 7 para 5 may be enforced by an application to a magistrates court: see Sch 7 para 6. As to magistrates courts see MAGISTRATES.

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(3) POWERS AND OFFENCES/(i) Powers of the Commissioners of Customs and Excise/852. Powers of entry, search and arrest.

852. Powers of entry, search and arrest.

For the purpose of exercising any powers under the Finance Act 1994¹ an authorised person² may at any reasonable time enter premises used in connection with the carrying on of a business³. If a justice of the peace is satisfied on information on oath that there is reasonable ground for suspecting that a fraud offence⁴ which appears to be of a serious nature is being, has been or is about to be committed on any premises, or that evidence of the commission of such an offence is to be found there⁵, he may issue a warrant in writing authorising any authorised person to enter those premises, if necessary by force, at any time within one month from the time of the issue of the warrant and search them⁶. A person who enters the premises under the authority of the warrant may:

- 410 (1) take with him such other persons as appear to him to be necessary⁷;
- 411 (2) seize and remove any documents or other things whatsoever found on the premises which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of a fraud offence which appears to him to be of a serious nature⁸;
- 412 (3) search or cause to be searched any person found on the premises whom he has reasonable cause to believe to be in possession of any such documents or other things⁹.

An authorised person seeking to exercise the powers conferred by a warrant or, if there is more than one of them, the one who is in charge of the search must provide a copy of the warrant endorsed with his name to the occupier of the premises concerned if he is present at the time the search is to begin¹⁰, or if at that time the occupier is not present but a person who appears to the authorised person to be in charge of the premises is present, to that person¹¹. If no such person is present the copy is to be left in a prominent place on the premises¹². Where an authorised person has reasonable grounds for suspecting that a fraud offence has been committed he may arrest anyone whom he has reasonable grounds for suspecting to be guilty of the offence¹³.

1 Ie under the Finance Act 1994 Pt III (ss 48-74) (as amended).

2 For the meaning of 'authorised person' see PARA 851 note 4 ante.

3 Finance Act 1994 s 64, Sch 7 para 4(1).

4 A 'fraud offence' means an offence under the provisions of *ibid* Sch 7 para 9(1)-(5) (see PARA 853 post): Sch 7 para 4(7).

5 *Ibid* Sch 7 para 4(2)(a).

6 *Ibid* Sch 7 para 4(2). A warrant may provide that the powers conferred by it are not to be exercisable by more than the number of authorised persons specified in it, outside such times of day as may be so specified, or otherwise than in the presence of a constable in uniform: see Sch 7 para 4(4). As to the issue of warrants by a justice of the peace see *MAGISTRATES* vol 29(2) (Reissue) PARA 541.

7 *Ibid* Sch 7 para 4(3)(a).

8 *Ibid* Sch 7 para 4(3)(b). As to the requirements relating to the provision of a receipt for anything removed and for allowing access to such items see PARA 851 note 19 ante.

- 9 Ibid Sch 7 para 4(3)(c). No woman or girl may be searched except by a woman: Sch 7 para 4(3).
- 10 Ibid Sch 7 para 4(5)(a).
- 11 Ibid Sch 7 para 4(5)(b).
- 12 Ibid Sch 7 para 4(5)(c).
- 13 Ibid Sch 7 para 4(6).

UPDATE

852 Powers of entry, search and arrest

TEXT AND NOTES--Finance Act 1994 Sch 7 para 4(2)-(7) repealed: Finance Act 2007 Sch 22 para 9, Sch 27 Pt 5(1).

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PREMIUM TAX/(3) POWERS AND OFFENCES/(ii) Offences and Penalties/853. Criminal offences.

(ii) Offences and Penalties

853. Criminal offences.

A person is guilty of an offence¹ if:

- 413 (1) being a registrable person² he is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of tax by him or another registrable person³; or
- 414 (2) not being a registrable person, he is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of tax by a registrable person⁴;
- 415 (3) if with the requisite intent⁵ he produces, furnishes or sends, or causes to be produced, furnished or sent⁶, any document which is false in a material particular⁷; or
- 416 (4) if with the requisite intent he otherwise makes use for those purposes of a document as referred to in head (3) above⁸;
- 417 (5) if in furnishing any information⁹ he makes a statement which he knows to be false in a material particular or recklessly makes a statement which is false in a material particular¹⁰;
- 418 (6) if his conduct during any specified period must have involved the commission by him of one or more offences under heads (1) to (5) above, whether or not the particulars of that offence or those offences are known¹¹;
- 419 (7) if he enters into a taxable insurance contract, or he makes arrangements for other persons to enter into a taxable insurance contract, with reason to believe that tax in respect of the contract will be evaded¹²;
- 420 (8) if he enters into taxable insurance contracts without giving security, or further security he has been required to give¹³.

1 The Customs and Excise Management Act 1979 ss 145-155 (as amended) apply in relation to the offences and penalties imposed by the Finance Act 1994 Sch 7 paras 9, 10 as they apply in relation to offences and penalties under the customs and excise Acts as defined in the former Act: Finance Act 1994 s 64, Sch 7 para 11. As to the Customs and Excise Management Act 1979 see CUSTOMS AND EXCISE.

2 For the meaning of 'registrable person' see PARA 836 note 2 ante.

3 Finance Act 1994 Sch 7 para 9(1)(a). Any reference to the evasion of tax includes a reference to the obtaining of a payment under regulations under s 55(3)(c), (d) or (f) (see PARA 838 ante): Sch 7 para 9(2).

4 Ibid Sch 7 para 9(1)(b). A person guilty of an offence under Sch 7 para 9(1)(a) or (b) is liable: (1) on summary conviction to a penalty of the statutory maximum or of three times the amount of the tax, whichever is the greater, or to imprisonment for a term not exceeding six months or to both; (2) on conviction on indictment to a penalty of any amount or to imprisonment for a term not exceeding seven years or to both: Sch 7 para 10(1)(a), (b). Reference to the amount of the tax is to be construed as a reference to the aggregate of the amount (if any) falsely claimed by way of credit, and the amount (if any) by which the gross amount of tax was falsely understated, where 'credit' means credit for which provision is made by regulations under s 55 and 'the gross amount of tax' means the total amount of tax due before taking into account any deduction for which provision is made by regulations under s 55(3): Sch 7 para 10(2), (8). For the meaning of 'statutory maximum' see PARA 22 note 5 ante.

5 The requisite intent is intent to deceive or to secure that a machine will respond to the document as if it were a true document: *ibid* Sch 7 para 9(3).

6 *Ie* for the purposes of *ibid* Pt III (ss 48-74) (as amended).

7 Ibid Sch 7 para 9(3)(a).

8 Ibid Sch 7 para 9(3)(b). As to the requisite intent see note 5 supra. A person guilty of an offence under Sch 7 para 9(3) or (4) is liable: (1) on summary conviction to a penalty of the statutory maximum or, in a case where the document is a return required under Pt III (as amended), if it is greater a penalty equal to three times the aggregate of the amount (if any) falsely claimed by way of credit and the amount (if any) by which the gross amount of tax was understated, or to imprisonment for a term not exceeding six months or to both; (2) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years or to both: Sch 7 para 10(3), (4). As to the meanings of 'credit' and 'gross amount of tax' see note 4 supra.

9 Ie for the purposes of ibid Pt III (as amended).

10 Ibid Sch 7 para 9(4). The penalty is as set out in note 8 supra.

11 Ibid Sch 7 para 9(5). A person guilty of an offence is liable: (1) on summary conviction to a penalty of the statutory maximum or (if greater) three times the amount of any tax that was or was intended to be evaded by his conduct, or to imprisonment for a term not exceeding six months or to both; (2) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding seven years or to both; and Sch 7 paras 9(2) (see note 3 supra), 10(2) (see note 4 supra) apply for the purposes of this provision: Sch 7 para 10(5). 'Conduct' includes any act, omission or statement: s 73(1).

12 Ibid Sch 7 para 9(6). For the meaning of 'taxable insurance contract' see PARA 831 note 4 ante. A person guilty of an offence is liable on summary conviction to a penalty of level 5 on the standard scale or three times the amount of the tax, whichever is the greater: Sch 7 para 10(6). As to the standard scale see PARA 22 note 9 ante.

13 Ie under ibid Sch 7 para 24 (see PARA 837 text and notes 7-8 ante): Sch 7 para 9(7). A person guilty of an offence is liable on summary conviction to a penalty of level 5 on the standard scale: Sch 7 para 10(7).

Halsbury's Laws of England/INSURANCE (VOLUME 25 (2003 REISSUE))/14. INSURANCE PREMIUM TAX/(3) POWERS AND OFFENCES/(ii) Offences and Penalties/854. Civil penalties.

854. Civil penalties.

Where, for the purpose of evading tax¹, a registrable person² does any act or omits to take any action, and his conduct involves dishonesty whether or not it is such as to give rise to criminal liability, he is liable to a penalty equal to the amount of tax evaded or sought to be evaded by his conduct³. Statements made or documents produced by or on behalf of a person are not inadmissible in specified proceedings⁴ by reason only that it has been drawn to his attention:

- 421 (1) that, in relation to tax, the Commissioners⁵ may assess an amount due by way of a civil penalty instead of instituting criminal proceedings and, though no undertaking can be given as to whether the Commissioners will make such an assessment in the case of any person, it is their practice to be influenced by the fact that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for investigation; and
- 422 (2) that the Commissioners or, on appeal, an appeal tribunal⁶ have power to reduce a civil penalty,

and that he was or may have been induced thereby to make the statements or produce the documents⁷.

If a person is liable to a penalty under these provisions the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount, including nil, as they think proper⁸. In the case of a penalty reduced by the Commissioners, an appeal tribunal on an appeal relating to the penalty may cancel the whole or any part of the reduction made by the Commissioners⁹. In exercising these powers the Commissioners or any appeal tribunal are not entitled to take into account¹⁰ (a) the insufficiency of the funds available to any person for paying any tax due or for paying the amount of the penalty; (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of tax¹¹.

Specific penalties are prescribed where a person fails to comply with his obligations to notify the Commissioners of certain facts¹², to pay tax due or to furnish a return within the required time¹³, to pay any tax following the service of a liability notice¹⁴, to take certain steps with regard to the appointment of a tax representative¹⁵ or where distress is levied¹⁶.

Where a person is liable to a penalty under any of the provisions in this paragraph the Commissioners may assess the amount due by way of penalty and notify it to him accordingly, and the fact that any conduct giving rise to a penalty may have ceased before an assessment is made does not affect the power of the Commissioners to make an assessment¹⁷. Subject to certain exceptions¹⁸ if it appears to the Commissioners that the amount which ought to have been assessed in an assessment exceeds the amount which was so assessed, then under the like provision as that assessment was made, and on or before the last day on which that assessment could have been made, the Commissioners may make a supplementary assessment of the amount of the excess and must notify the person concerned accordingly¹⁹. An amount which has been assessed and notified to any person is recoverable as if it were tax due from him unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced²⁰.

1 Evading tax includes obtaining a payment under regulations under the Finance Act 1994 s 55(3)(c), (d) or (f) (see PARA 838 ante) in circumstances where the person concerned is not entitled to the sum: s 64, Sch 7 para 12(2).

- 2 For the meaning of 'registrable person' see PARA 836 note 2 ante.
- 3 Finance Act 1994 Sch 7 para 12(1). If, however, the person is convicted of an offence (whether under the Act or otherwise) by reason of the conduct he is not also liable to a penalty under this provision: see Sch 7 para 12(7). The amount of tax evaded or sought to be evaded is the aggregate of the amount (if any) falsely claimed by way of credit and the amount (if any) by which the gross amount of tax was falsely understated where 'credit' means credit for which provision is made by regulations under s 55 of the Act (see PARA 838 ante) and 'the gross amount of tax' means the total amount of tax due before taking into account any deduction for which provision is made by regulations under s 55(3): Sch para 12(3), (4). For the meaning of 'conduct' see PARA 853 note 11 ante.
- 4 The proceedings are (1) any criminal proceedings against the person concerned in respect of any offence in connection with or in relation to insurance premium tax, and (2) any proceedings against him for the recovery of any sum due from him in connection with or in relation to insurance premium tax: *ibid* Sch 7 para 12(6).
- 5 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.
- 6 For the meaning of 'appeal tribunal' see PARA 850 note 1 ante.
- 7 Finance Act 1994 Sch 7 para 12(5).
- 8 *Ibid* Sch 7 para 13(1).
- 9 *Ibid* Sch 13 para 13(2).
- 10 See *ibid* Sch 7 para 13(3).
- 11 *Ibid* Sch 7 para 13(4).
- 12 *Ie* under *ibid* s 53(2), (3) (as to which see PARA 840 text and notes 7, 8 ante) or s 53AA(3) (as added) (as to which see PARA 841 text and note 5 ante): see Sch 7 paras 14, 17 (para 14 amended by the Finance Act 1997 s 27(11)).
- 13 *Ie* by virtue of regulations made under the Finance Act 1994 s 54: see Sch 7 para 15; and PARA 836 ante.
- 14 *Ie* by virtue of regulations made under *ibid* s 65: see Sch 7 para 16; and PARA 847 ante.
- 15 *Ie* under *ibid* s 57(3), (7) or (9): see Sch 7 para 18; and PARA 845 ante.
- 16 See *ibid* Sch 7 para 19 (amended, as from a day to be appointed, by the Finance Act 1997 s 53(5), (9)).
- 17 Finance Act 1994 Sch 7 para 25(1). Assessment is to be made in accordance with the provisions of Sch 7 para 25 and within the time limits in Sch 7 para 26.
- 18 *Ie* otherwise than in circumstances falling within *ibid* s 56(5)(b): Sch 7 para 27. As to those circumstances see PARA 848 text and note 10 ante.
- 19 *Ibid* Sch 7 para 27.
- 20 *Ibid* Sch 7 para 25(8).

UPDATE

854 Civil penalties

TEXT AND NOTES 1-11--Finance Act 1994 Sch 7 paras 12, 13 repealed: Finance Act 2008 Sch 40 para 21(d)(ii). See now Finance Act 2007 Sch 24; and INCOME TAXATION vol 23(2) (Reissue) PARA 1712A.

TEXT AND NOTES 12, 13--Finance Act 1994 Sch 7 paras 14, 15, 17 (amended by SI 2009/571) include a penalty for a deliberate inaccuracy under the Finance Act 2007 Sch 24 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1712A). If (1) a person ('P') fails to pay insurance premium tax when it becomes due and payable; (2) P makes a request

to an officer of Revenue and Customs that payment of the surcharge be deferred; and (3) such an officer agrees that payment of that amount may be deferred for a period ('the deferral period'), P is not liable to a penalty under the Finance Act 1994 Sch 7 para 15 for failure to pay the amount concerned if P would otherwise become liable to such interest between the date on which he makes the request and the end of the deferral period: Finance Act 2009 s 108(1), (2), (5). However, if P breaks the agreement, and an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from the above provisions, P becomes liable, at the date of the notice, to that penalty: s 108(3). P breaks an agreement for this purpose if he fails to pay the amount of tax in question when the deferral period ends, or the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it: s 108(4).

If the agreement mentioned above is varied at any time by a further agreement between P and an officer of Revenue and Customs, s 108 applies from that time to the agreement as varied: s 108(6). The Treasury may by order made by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons, amend the taxes and penalties referred to above: s 108(7)-(9).

NOTE 15--Finance Act 1994 Sch 7 para 18 repealed: Finance Act 2008 s 142.

NOTE 17--Finance Act 1994 Sch 7 para 26 amended: Finance Act 2009 Sch 51 para 4 (in force 1 April 2011: SI 2010/867).

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855. Evidence.

A certificate of the Commissioners¹:

- 423 (1) that a person was or was not at any time registered²;
- 424 (2) that any return required has not been made or had not been made at any time³; or
- 425 (3) that any tax shown as due in a return, or in an assessment has not been paid⁴,

is sufficient evidence of that fact until the contrary is proved⁵.

Any document purporting to be a certificate is to be taken to be such a certificate until the contrary is proved⁶.

1 For the meaning of 'the Commissioners' see PARA 831 note 10 ante.

2 Ie under the Finance Act 1994 s 53: s 64, Sch 7 para 29(1)(a). As to registration under s 53 see PARA 840 ante.

3 Ie by regulations under ibid s 54: Sch 7 para 29(1)(b). As to such regulations see PARA 836 ante.

4 Ie a return made in pursuance of regulations made under ibid s 54 (see PARA 836 ante), or an assessment made under s 56 (see PARA 848 ante): Sch 7 para 29(1)(c).

5 Ibid Sch 7 para 29(1).

6 Ibid Sch 7 para 29(2).

UPDATE

855 Evidence

NOTE 4--Finance Act 1994 Sch 7 para 29(1)(c) repealed: Finance Act 2008 Sch 44 para 5.